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88-452

No. ———

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TENNECO OIL COMPANY,
Petitioner,

v.

KERN OIL & REFINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court below err in accepting and relying upon findings of fact and conclusions of law entered by the District Court after a proper notice of appeal had divested the District Court of jurisdiction, contrary to the holdings of this Court and the Third, Fifth, and Seventh Circuits?

2. May a District Court prohibit a party—by enforcing a stipulated umbrella protective order, barring the public and press from the courtroom, and refusing to unseal the trial record and exhibits until after its decision in the case—from presenting to a federal regulatory agency evidence—later found by the agency to be true—that the other party had perpetrated a fraud on the agency?

PARTIES TO THE PROCEEDINGS

Petitioner Tenneco Oil Company is wholly-owned by Tenneco Corporation, which is wholly-owned by Tennessee Gas Pipeline Company, which in turn is wholly owned by Tenneco Inc. Pursuant to Rule 28.1, a complete listing of all subsidiaries and affiliates of Tenneco Inc. appears at Appendix M. Tenneco Oil Company was defendant-counterclaimant in the District Court and appellant in the Court of Appeals. Respondent Kern Oil & Refining Company was plaintiff-counterdefendant in the District Court and appellee in the Court of Appeals.

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KERN OIL & REFINING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Tenneco Oil Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on March 7, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 840 F.2d 730 and is reprinted in the appendix hereto ("App.") at 1a. The various opinions of the District Court are unreported and are reprinted at App. 24a, 28a, 31a, 39a, 46a, and 53a.

JURISDICTION

The District Court entered judgment against petitioner on November 5, 1986. App. 50a. Petitioner filed a notice of appeal on November 21, 1986. *See* App. 6a. Three days later, on November 24, 1986, the District Court entered its findings of fact and conclusions of law. App.

53a, 81a. The Court of Appeals affirmed on March 7, 1988, App. 1a, and denied a timely-filed petition for rehearing on May 19, 1988. App. 22a. On August 3, 1988, Justice O'Connor entered an order extending the time to file a petition for certiorari to and including September 16, 1988. App. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION AND RULES

The pertinent parts of the First Amendment to the United States Constitution and Fed. R. Civ. P. 26(c), 52, and 59 are set forth at App. 87a.

STATEMENT OF THE CASE

In May 1977, Tenneco Oil Company ("Tenneco") and a predecessor to Kern Oil & Refining Company ("Kern") entered into a contract under which Tenneco agreed to sell and Kern agreed to purchase oil produced by Tenneco from the Yowlumne oil field in California. The parties soon came to disagree over the requirements of the contract and of applicable regulations issued by the Department of Energy ("DOE"). Kern responded by filing three lawsuits in United States District Court for the Central District of California, the last two of which are the subject of this petition.[1]

In one of these—filed in July 1981—Kern alleged that Tenneco violated DOE regulations. In the other—a diversity action filed in December 1982—Kern relied on the same acts to allege a breach of the contract. The District Court consolidated these two actions. In essence, Kern's claim in the two suits was that Tenneco violated

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[1] The first suit—filed in February 1981—concerned the *price* of the oil subject to the contract. It proceeded independently of the suits at issue in this case, which concern the *supply* of oil under the contract. *Kern Oil & Refining Co.* v. *Tenneco Oil Co.*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987).

DOE regulations and the 1977 contract by failing to supply Kern with *all* of the oil produced from the Yowlumne field. Tenneco contended that Kern was in fact unable to accept all of the oil due to limits on its refining capacity, and that Kern knowingly redelivered excess oil to Tenneco under a separate 1978 contract.

During the pertinent time period, the DOE entitlements program—designed to equalize the cost of "price controlled" and "uncontrolled" oil to refiners—was in effect. Refiners were required to purchase an "entitlement" to refine "price controlled" oil and to report, under oath, the number of price controlled barrels refined each month. *See* Mandatory Petroleum Allocation Regulations, 10 C.F.R. § 211.1-.71 (1979). Instead, during the damage period, Kern systematically refined price controlled oil but reported to DOE that it was refining uncontrolled oil. It did not purchase entitlements on such oil.

The operation of this program was directly pertinent to Kern's damage claim, in that the cost of entitlements increased the cost of oil to Kern so substantially that Kern would not have rationally purchased and refined the additional price controlled oil it was claiming from Tenneco. Removing the price controlled barrels from Kern's damage claim would have reduced its damages by more than $6 million.

In early 1985, during the course of discovery, Tenneco uncovered documents demonstrating that Kern had defrauded DOE by evading its obligations to purchase entitlements on the price controlled oil it refined. Tenneco promptly moved in the District Court, on April 18, 1985, for leave to disclose these documents to DOE. Such leave was necessary because the parties had stipulated at the outset of discovery to a routine umbrella protective order, covering all documents and information obtained through discovery. App. 83a.

The District Court, in September 1985, ordered Kern to show "good cause" under Fed. R. Civ. P. 26(c) as to why disclosure of the specified documents should not be permitted. App. 25a. As the District Court itself noted, however, "Kern elected not to make its showing of good cause." App. 25a. Instead, Kern argued that Tenneco should be bound by the umbrella protective order even in the absence of good cause. App. 26a. One month later, on October 11, 1985, the District Court expressly found that "Kern has failed to demonstrate good cause why the disclosure of Exhibits B, D, G, E (apart from those documents listed in Exhibit B to Tenneco's Second Supplemental Memorandum) and F (as revised) should not be permitted * * *." App. 29a. Despite the absence of "good cause," the court nonetheless barred Tenneco from turning the documents over to DOE on the grounds that Tenneco was "bound by th[e] agreement" and that permitting disclosure "can only result in further delay and may further complicate and extend the present proceedings with no assurance that positive and constructive results will be achieved." App. 27a, 29a.

During the trial, the District Court closed the courtroom and evicted members of the public when the issue of Kern's fraud arose. The transcript reveals the following:

> Mr. Sherwood [counsel for Kern]: [W]e would request that the proceedings insofar as there be testimony on that subject be closed, and that the transcript be sealed pending further order of the Court.
>
> The Court: All right. Proceedings closed. Now, what do you mean by that?
>
> Mr. Sherwood: Well, we, as you may recall, resisted the effort on the part of Tenneco to turn over discovery materials to the DOE. We wish to make sure that at least pending further order of the Court, that insofar as these matters are presented in open court either by testimony or by exhibit, that those not be available for disclosure to anybody else, and that the public, who may or may not have an exotic

interest in the subject, be excluded from the courtroom.

The Court: Well, that's consistent with my order, and I think that order should continue.

* * * *

Proceedings will be closed. In light of that, I'm going to ask you to excuse yourselves. Thank you. [Ct. App. Excerpts of Record, at 1896-98.]

The documents Tenneco wished to disclose to DOE were then admitted into evidence in secrecy, and kept under seal. On July 2, 1986, after the trial had concluded, Tenneco moved yet again to unseal the trial record and exhibits, so that it could reveal Kern's fraud to DOE. *Id.* at 963.

On August 28, 1986—still without having ruled on Tenneco's post-trial disclosure motion—the District Court issued a decision on the merits, concluding that Kern was entitled to collect from Tenneco some $32 million in damages, interest, and attorneys' fees. App. 39a. In calculating damages, the court rejected Tenneco's argument based on the documents that Tenneco was barred from showing to DOE, stating that Kern's conduct "was not violative of federal regulations" and that "the Department of Energy made an audit of entitlements compliance * * * and found Kern to be in compliance." App. 43a. DOE itself, of course, had not yet had *any* opportunity to address the question, since the District Court had forbidden Tenneco from presenting its evidence of Kern's fraud to DOE, had closed the courtroom to prevent disclosure of the evidence, and had yet to rule on Tenneco's post-trial motion to unseal the record. The court's Memorandum concluded by directing counsel for Kern to prepare findings of fact and conclusions of law, as well as a judgment. App. 45a.

On September 19, 1986, in response to a mandamus petition filed by Tenneco, the Court of Appeals for the

Ninth Circuit in effect suggested that the District Court rule on Tenneco's post-trial disclosure motion within 14 days. On September 25, 1986, the District Court issued an Order on the motion. The Order recognized the conflict in the Circuits over the First Amendment right of access to records in a civil case, and noted that "this issue has not been addressed by either the Ninth Circuit or the Supreme Court." App. 47a. The court granted Tenneco's motion for reasons that confirmed the grounds on which it had earlier barred disclosure and closed the courtroom:

> Because this matter has now been tried, presentation by Tenneco of the documents at issue to the DOE will not delay proceedings before this Court. Moreover, when ruling on Tenneco's original motion for disclosure, *this Court found that Kern had failed to demonstrate good cause* as to why the documents should remain under seal. The Court now reaffirms this finding. * * * There being no good cause for the maintenance of the protective orders, those orders are vacated insofar as they pertain to trial exhibits received into evidence and to the trial transcript. [App. 48a (emphasis supplied).]

The court stayed its Order until October 3, 1986, and Kern—relentlessly attempting to block disclosure of its documents to DOE—sought a stay from the Ninth Circuit and this Court. Both efforts failed and, on October 3—eighteen months after seeking permission to contact DOE—Tenneco was finally permitted to present the evidence of Kern's fraud to DOE. That agency immediately opened an investigation of Kern, and on March 31, 1987, issued a Proposed Remedial Order seeking $60 million from Kern due to its fraud during the damage period.

The DOE order specified that Kern "reduced its post-entitlements cost of crude oil below that which it would have incurred if it had properly reported its controlled tier crude oil receipts to the Entitlements Program," that

transactions reported by Kern "never really took place" and "were designed, in fact, 'for the purpose of camouflaging the real deal' from the DOE," and that Kern "unlawfully evaded its obligations under the Entitlements Program." [2]

The disclosure and its resulting action by DOE, however, came too late to affect proceedings in the District Court. On November 5, 1986, that court entered its judgment against Tenneco. App. 50a. Tenneco filed its notice of appeal on November 21, 1986.[3] Three days *after* Tenneco's notice of appeal—on November 24, 1986—the District Court entered the findings of fact and conclusions of law required under Fed. R. Civ. P. 52.

The Court of Appeals affirmed, rejecting Tenneco's argument that the notice of appeal divested the District Court of jurisdiction to enter findings of fact and conclusions of law. According to the Ninth Circuit, "divestiture of district court jurisdiction does not rest on a statute" but is rather a " 'judge-made doctrine' " that may be departed from on a case-by-case basis.[4] The court held that Tenneco "suffered no harm by the late filing," rejecting Tenneco's argument that the District Court's be-

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[2] Ct. App. Excerpts of Record, at 3771, 3777. As required by law, 10 C.F.R. § 205.192(d), the Proposed Remedial Order was accompanied by a declaration of the DOE employee primarily knowledgeable about the case that "to the best of my knowledge and belief, the findings of fact are correct." Ct. App. Excerpts of Record, at 3785. Kern has sought review of the Proposed Remedial Order.

[3] Since the District Court's unitary judgment included a claim within the exclusive jurisdiction of the Temporary Emergency Court of Appeals ("TECA"), Tenneco noted an appeal to that court as well as the Ninth Circuit. Proceedings before TECA were stayed pending decision by the Ninth Circuit. On August 15, 1988, TECA issued an order setting forth a briefing schedule, with briefing to be complete by September 23, 1988.

[4] App. 6a (quoting 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 203.11, at 3-45 n.1 (2d ed. 1987)).

lated entry of its findings and conclusions deprived Tenneco of any opportunity to move for amended findings and conclusions under Fed. R. Civ. P. 52(b) and 59(a). According to the Court of Appeals, permitting Tenneco to file such motions "would be pointless." App. 7a.

The Ninth Circuit also rejected Tenneco's claim that the District Court erred when it barred Tenneco from presenting the evidence of Kern's fraud to DOE in a timely manner. Kern had supported its damage claims at trial by arguing that it would have refined additional price controlled oil from Tenneco. Now that the Kern documents had at last been revealed to DOE, however, the same Kern officials were taking the exact opposite position in seeking to overturn the DOE Proposed Remedial Order. Kern was now arguing before DOE that the cost of entitlements made price controlled oil too expensive to refine and that it would *not* have refined any additional price controlled Tenneco oil. *See* App. 17a.

Tenneco contended before the Ninth Circuit that, had it been able to reveal the documents to DOE in a timely fashion, Kern would not have been able to take such inconsistent positions, and the District Court could have considered DOE's findings—not just Tenneco's arguments —in assessing Kern's damage claims. The Court of Appeals, however, stated that the fact "[t]hat Kern is now arguing a different theory to a different tribunal certainly weakens its new position, but does not make the district court's earlier conclusion clearly unsupported by the evidence." App. 17a.

REASONS FOR GRANTING THE WRIT

I. The District Court Lacked Jurisdiction To Enter Findings Of Fact And Conclusions Of Law After The Filing Of A Notice Of Appeal

This Court recently held that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). *See Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 376, 379 (1985). Other Circuits have also recognized that "upon the filing of the notice of appeal the district court loses its power to take any further action in the proceeding except in aid of the appeal, to correct clerical mistakes under Fed. R. Civ. P. 60(a), or in aid of execution of a judgment that has not been stayed or superseded." [5] The court below crafted another exception to this fundamental principle of appellate jurisdiction. It permitted the District Court to enter findings of fact and conclusions of law *after* a proper notice of appeal had divested that court of jurisdiction. Although "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously," *Griggs*, 459 U.S. at 58, that is precisely the result sanctioned by the court below in this case.

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[5] *Henry* v. *Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986). *See, e.g., Nicol* v. *Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984); *Rucker* v. *U.S. Dept. of Labor*, 798 F.2d 891, 892 (6th Cir. 1986); *Venen* v. *Sweet*, 758 F.2d 117, 120 (3d Cir. 1985); *Garcia* v. *Burlington Northern R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987). *See also* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3949, at 359 (1977) ("So complete is this transfer of jurisdiction that any orders of the district court touching upon the substance of the matter on appeal are considered null and void if entered subsequent to the timely filing of the notice of appeal").

This Court long ago recognized the inherent prejudice in permitting findings and conclusions to be entered after an appeal has been taken from the underlying judgment. *Generes* v. *Bonnemer*, 74 U.S. (7 Wall.) 564 (1869).[6] Tenneco was left without hearing and without remedy with respect to the findings and conclusions belatedly entered by the District Court after the notice of appeal. Although Rules 52(b) and 59(a) expressly provide a means to correct erroneous findings or judgments, the time to file such motions expired before the court even entered its findings.

The Ninth Circuit justified its new exception on the ground that adhering to the rule would result in "needless paper shuffling." App. 6a. The rule reiterated by this Court in *Griggs*, however, is not a matter of discretion, depending on the particular facts of each case. The filing of a notice of appeal is an event of "jurisdictional significance," *Griggs*, 459 U.S. at 58, not simply a factor to be considered in efficient docket control. As this Court emphasized last Term, rules concerning the allocation of jurisdiction between trial and appellate courts "should above all be clear." This is an area in which "[c]ourts and litigants are best served by * * * bright-line rule[s]" rather than case-by-case analysis of the sort engaged in below. *Budinich* v. *Becton Dickinson & Co.*, 108 S. Ct. 1717, 1722 (1988).[7]

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[6] There, a unanimous Court noted:

> To permit the judge to make a statement of facts, on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record, entirely in the power of the judge, without hearing and without remedy. [*Id.* at 565. *Accord Avendano* v. *Gay*, 75 U.S. (8 Wall.) 376 (1869).]

[7] *See Christianson* v. *Colt Indus. Operating Corp.*, 108 S. Ct. 2166, 2178 (1988) (adhering to "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists," despite recognition that such adherence would create

Other Circuits have recognized the "jurisdictional significance" of a notice of appeal, repeatedly confirming that a District Court lacks authority to act after a proper notice of appeal, regardless of any apparent wastefulness caused by adherence to this rule. Thus, in *Ced's Inc.* v. *EPA*, 745 F.2d 1092 (7th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985), the Seventh Circuit held that the trial court was wholly without jurisdiction, no matter what the motivation, to issue additional grounds supporting its ruling after a notice of appeal had been filed. *Id.* at 1095. In *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1326 (5th Cir. 1985), the Fifth Circuit concluded that the District Court lacked jurisdiction to enter an "order supplementing judgment" after filing of the notice of appeal, even though the order only clarified that certain plaintiffs were minors represented by their parents. And in *Philadelphia Marine Trade Ass'n* v. *International Longshoremen's Ass'n, Local 1291*, 365 F.2d 295, 300 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967), the Third Circuit rejected a complaint that the District Court failed to make findings of fact and conclusions of law, noting that the fact that the other party had filed a proper notice of appeal "precluded the trial Court from entering findings of fact and conclusions of law even if they were required in this instance."

This question was hotly debated in the course of the famous aluminum antitrust litigation, which culminated in a final decision by the three senior judges of the Second Circuit when a quorum of this Court was not avail-

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wastefulness); *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 n.3 (1988) (strict adherence to jurisdictional rule regarding naming of parties taking appeal; rejecting argument that Court "should apply 'harmless error' analysis to defects in a notice of appeal. This argument misunderstands the nature of a jurisdictional requirement").

able.[8] The trial judge in that case had delivered an oral opinion announcing his intent to dismiss the Government's action. The Government thereupon urged the court to enter judgment immediately without waiting for the formal findings and conclusions required under Rule 52, in order "to enable it to get the case into the Supreme Court at the earliest possible moment." *United States* v. *Aluminum Company of America*, 2 F.R.D. 224, 236 (S.D.N.Y. 1941). The court refused to do so, noting that the Government's planned immediate appeal would divest the trial court of any jurisdiction to enter the required findings:

> If a final order were entered and an appeal therefrom perfected, * * * clearly the jurisdiction of this court to make findings would thereupon be at an end. * * * I think that the Supreme Court has gone further; it has specifically ruled, or at least strongly indicated, that making findings is one of the things as to which jurisdiction is terminated by an appeal being perfected. [Id.]

The leading authority to the contrary is *Silverthorne* v. *Laird*, 460 F.2d 1175 (5th Cir. 1972). There, the trial court issued an opinion some four months after the notice of appeal and two days before oral argument of the appeal. The appellant argued that the notice had divested the District Court of jurisdiction, but the Court of Appeals disagreed, noting that the District Court's "amplified views are of great aid in this appeal." *Id.* at 1178. This ruling, we submit, was in error.

More recently, the court in *Under Sea Industries, Inc.* v. *Dacor Corp.*, 833 F.2d 1551, 1555-59 (Fed. Cir. 1987), ruled that findings and conclusions entered by the District Court two months after a proper notice of appeal from the judgment were "valid," and the appellate court

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[8] *United States* v. *Aluminum Company of America*, 322 U.S. 716 (1944), *certified and transferred*, 148 F.2d 416 (2d Cir. 1945).

relied extensively upon those findings in affirming the judgment. The court's action in doing so, however, illustrates the inevitable practical problems. The appellant in *Under Sea*, confronted with entry of the District Court's findings and conclusions two months after his appeal, quite naturally filed a second notice of appeal from the findings and conclusions. The Federal Circuit —although it relied heavily on the belated findings and conclusions—nonetheless dismissed the appeal from those findings and conclusions, noting that an appeal is proper only from a judgment. *Id.* at 1555-56.[9]

Judge Posner recently took note of this conflict, writing in response to a trial judge's practice of deciding bankruptcy cases orally but writing an opinion should the losing party appeal. *Matter of Jones*, 768 F.2d 923, 930-932 (7th Cir. 1985) (concurring opinion). Judge Posner remarked that

> the practice raises a number of serious questions, of which the most fundamental is whether it is authorized by law. The filing of the notice of appeal from a final judgment ordinarily divests the district court of jurisdiction over the case and shifts it to the court of appeals * * *. [*Id.* at 930.]

Noting the conflict on the question, Judge Posner concluded that acceptance of such an exception "would on balance impede rather than facilitate the appellate process." *Id.* at 931. In particular, he noted that the prac-

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[9] Indeed, the Federal Circuit, shortly after *Under Sea*, expressed its discomfort with the filing of findings and conclusions after notice of appeal. In *Hybritech Inc.* v. *Abbott Laboratories*, 849 F.2d 1446, 1450 (Fed. Cir. 1988), the court grudgingly upheld the practice once again, but cautioned that "[w]e * * * cannot condone, in all cases, the procedure followed by the district court judge in this case." The court stated that it was preferable for the trial court to refrain from entering an appealable order until *after* entry of findings and conclusions. The contrary practice—endorsed by the Ninth Circuit in this case—"can lead to wasted effort both by the litigants and by the court." *Id.* at 1451.

tice can "throw[] off the appellate timetable" and "converts the opinion-writing process from exploration to rationalization." *Id.* at 932.

The court below relied upon its own *ad hoc* view of convenience and efficiency in creating an exception to the *Griggs* rule. Other Circuits, however, have recognized the danger in creating jurisdictional exceptions on that basis. In *Venen* v. *Sweet*, *supra*, the District Court denied a motion to dismiss based on judicial immunity, and the defendant appealed. The District Court thereafter reconsidered and dismissed the complaint on grounds of immunity, and the *plaintiff* appealed. The Third Circuit, relying on *Griggs*, held that the District Court had been divested of jurisdiction by the first appeal, stressing that "'[d]ivest' means what it says" and that "jurisdictional requirements may not be disregarded for convenience sake." 758 F.2d at 120-121, 123. It vacated the post-notice order and dismissed the second appeal, even though this course would necessarily result in further proceedings.

In *Henry* v. *Farmer City State Bank*, 808 F.2d at 1240-41, the Seventh Circuit held that a District Court was without jurisdiction to enjoin state court litigation commenced by plaintiffs, whose parallel claims were thrown out of federal court, after the plaintiffs had appealed the dismissal. Even though the defendants had to defend themselves "against litigation which at this point appears to be without merit" and could refile their motion for an injunction when the case returned to the District Court, the Court of Appeals nonetheless properly enforced the jurisdictional rule.

In *Gormong* v. *Local Union 613, IBEW*, 714 F.2d 1109 (11th Cir. 1983), the District Court granted plaintiffs' motion to dismiss without prejudice, but the clerk erroneously entered judgment on the merits against plaintiff. The plaintiff filed a notice of appeal and, four days later,

the District Court *sua sponte* vacated the judgment. Although there was no question concerning the proper disposition of the case, the Court of Appeals properly refused to give effect to the District Court's post-notice order. Instead, the Court of Appeals engaged in what the Ninth Circuit might dismiss as "needless paper shuffling," sending the case back to the District Court to enter a proper order.[10]

There is no "harmless error" rule when it comes to jurisdiction. *See Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. at 2409 n.3; *Christianson* v. *Colt Indus. Operating Corp.*, 108 S. Ct. at 2178. The Federal Rules contemplate that erroneous findings and conclusions will be corrected *prior* to appeal; that is why Rules 52(b) and 59(a) authorize a District Court, upon motion of a party within ten days after entry of judgment, to amend or make new findings. Tenneco lost its opportunity under these Rules to challenge the findings and conclusions entered by the District Court, because they were entered three days *after* the notice of appeal rather than within ten days of the judgment. Tenneco's time to challenge the findings and conclusions expired before they were even entered.

This lost opportunity was not, as the Court of Appeals said, "pointless." App. 7a. In considering the merits of the contract dispute between the parties, the Ninth Circuit twice rejected arguments urged by Tenneco because they were not raised below. Tenneco in fact intended and was prepared to raise these arguments in the appro-

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[10] *Id.* at 1110. Even the Circuit that spawned *Silverthorne* has recognized the proper force of jurisdictional rules on other occasions. *See, e.g., Kirtland* v. *J. Ray McDermott & Co.*, 568 F.2d 1166, 1170 (5th Cir. 1978), in which the court rejected the contention that "it is undesirable, indeed a mere technicality, to dismiss the appeal and require the parties to make an unnecessary round trip to the trial court." This disturbing lack of uniformity is particularly unsettling with respect to jurisdictional rules.

priate post-trial motions it was barred from filing by the District Court's delinquent entry of findings and conclusions. In addition, by the time the findings and conclusions were entered, Tenneco had at last been permitted to present its evidence of Kern's fraud to DOE, and DOE had promptly opened an investigation of Kern. DOE's complaint against Kern came shortly thereafter. Had the matter been pending before the District Court at that time—due to post-trial motions by Tenneco—we can only assume that the District Court would have altered its findings and conclusions in the face of the directly contrary views of DOE and the directly contrary evidence now presented by Kern's own witnesses.

II. The Courts Below Violated The First Amendment, Rule 26(c), And Public Policy By Barring Tenneco From Presenting The Evidence Of Kern's Fraud To The Appropriate Federal Regulatory Agency

The District Court enforced a prior restraint on freedom of speech by prohibiting Tenneco from presenting documentary evidence of Kern's fraud on DOE to that agency, despite the express absence of "good cause" under Rule 26(c) to bar disclosure. Tenneco moved for permission to disclose the evidence of wrongdoing *eight months* before the start of trial. The trial court's failure to permit disclosure on the ground that it might delay trial—and its extreme steps of closing the courtroom to the press and public, and sealing the trial record and exhibits—contravened Tenneco's First Amendment rights, as well as Rule 26(c) and public policy.

Tenneco was directly harmed by the District Court's gag order. The concealment of Kern's fraud on DOE permitted Kern to argue at trial that it would have refined oil allegedly withheld by Tenneco. The District Court accepted this argument, increasing Kern's alleged damages. Now that the evidence shielded by the District Court has at last been revealed to DOE, Kern is arguing the opposite of what it argued before the District Court.

See App. 17a. Had Tenneco been permitted to reveal its evidence to DOE in a timely fashion, Kern would have been put to the choice before trial. At the very least, its inconsistent positions—and the fact that DOE agreed with Tenneco—would have refuted its argument before the District Court.[11]

A. The Decision Below Conflicts With This Court's Decision In *Seattle Times*

Four years ago, this Court addressed the relationship between civil discovery and the First Amendment in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984). That case arose out of a defamation action brought by members of a religious sect. In the course of discovery, the defendant publications requested production of the donor lists of plaintiffs' sect. The plaintiffs—fearing that publication of the lists by the media defendants would result in harassment of the donors—moved for a protective order, restricting defendants' use of the information to trial preparation only. The trial court entered the protective order and was upheld by the state Supreme Court.

This Court affirmed. Because the First Amendment protects information acquired through discovery, the Court demanded that any restraint on the dissemination

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[11] Tenneco's disclosure argument was extensively briefed and argued before the District Court, *see* Ct. App. Excerpts of Record, at 603, 607, 647, 679, 715, 746, 766, 821, 911, 955, 963, 1002, 1024, 1077, clearly decided by that court, *see* App. 24a, 28a, 46a, and raised and briefed before the Court of Appeals. *See* Appellant's Br. at 1, 4-5, 38-42, 59, Reply Br. at 19. The Ninth Circuit obliquely stated that Tenneco did not discuss the First Amendment. App. 16a n.10. As noted, that statement is untrue and, in any event, the Court of Appeals decided the disclosure claim, rejecting Tenneco's argument that it was harmed because the District Court "did not allow it to reveal [the] documents to the DOE until after the trial * * *." App. 16a. The disclosure issue, as developed below, hinges not only on the First Amendment but Fed. R. Civ. P. 26(c), common law, considerations of judicial administration, and public policy as well. It was properly raised and preserved below.

of that information both further " 'an important or substantial governmental interest unrelated to the suppression of expression' " and restrict First Amendment freedoms no more than " 'necessary or essential to the protection of the particular governmental interest involved.' " *Id.* at 32 (quoting *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974)). In the case before it the Court identified the prevention of discovery abuse in general and protection of the plaintiffs' rights of privacy and religious association in particular as substantial government interests, and concluded that a proper protective order could promote these interests consistent with the First Amendment. 467 U.S. at 34-35, 37 & n.24. The Court held that where "a protective order is entered *on a showing of good cause as required by Rule 26(c)*, is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.* at 37 (emphasis supplied).[12]

As this Court emphasized, the First Amendment is not offended when dissemination of discovery material is limited under a protective order "entered on a showing of good cause." *Id.* at 37. Here, the District Court enforced a prior restraint on Tenneco after expressly finding that "Kern has failed to demonstrate good cause why the disclosure * * * should not be permitted." App. 29a;

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[12] State rule 26(c) at issue in *Seattle Times* was the same as Fed. R. Civ. P. 26(c). Justice Brennan, joined by Justice Marshall, concurred, noting that "[t]he Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment." 467 U.S. at 37. The concurring Justices "agree[d] that the [plaintiffs'] interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment." *Id.* at 38. No similar interests, of course, are implicated in this case.

see App. 48a. The decision below thus conflicts sharply with this Court's opinion in *Seattle Times*.

It also conflicts on this score with the Second Circuit's recent decision in *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir.), *cert. denied*, 108 S. Ct. 344 (1987). The court there upheld the lifting of a blanket protective order:

> A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, *i.e.*, if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public inspection. [821 F.2d at 145.]

The court noted that this conclusion was "implicit" in *Seattle Times*. *Id.*

Since *Seattle Times*, the Circuits have not agreed on the appropriate application of that decision. Some Circuits have held that First Amendment considerations have no independent significance in the discovery process, and that the only question is the existence of "good cause" under Rule 26(c).[13] The Third Circuit has gone so far as to conclude that *Seattle Times* "confirmed" its

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[13] *See, e.g., In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356 (11th Cir. 1987) ("sole criterion for determining the validity of a protective order is the statutory requirement of 'good cause' "); *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986) (*"Cipollone I"*) (*Seattle Times* "prohibits a court considering a protective order from concerning itself with first amendment considerations"); *Tavoulareas* v. *Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984) (*en banc*) (assuming good cause, "the First Amendment does not require a court to apply especially close scrutiny in deciding whether to give parties to a civil litigation * * * a right to disseminate information gained through the pre-trial discovery process. Proper application of the good cause requirement * * * [is] a sufficient safeguard"), *cert. denied*, 108 S. Ct. 200 (1987).

view that " 'parties and counsel, by taking advantage of or a part in the discovery processes, implicitly waive their First Amendment rights freely to disclose or disseminate the information obtained through those processes.' " [14] The First Circuit, in contrast, has expressly noted that "[w]e do not agree with [the Third Circuit's] interpretation," ruling instead that *Seattle Times*

> means that first amendment considerations cannot be ignored in reviewing discovery protective orders. Although the "strict and heightened" scrutiny tests no longer apply, the first amendment is still a presence in the review process. Protective discovery orders are subject to first amendment scrutiny, but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause. [*Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986).]

Regardless of the approach, however, every Circuit to address the question—other than the court below—has at least insisted on the required showing of "good cause" under Rule 26(c). And while the lower courts have not settled on a uniform standard to measure "good cause," *see Cipollone I*, 785 F.2d at 1121 ("there appears to be a lurking dispute as to what may constitute good cause for a protective order"), even those Circuits holding that the First Amendment has no independent significance in this context have—perhaps because of that ruling—set a high standard for "good cause." The Third Circuit, for example, has held that

> the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. [*Id.*]

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[14] *New York* v. *United States Metals Refining Co.*, 771 F.2d 796, 802 (3d Cir. 1985) (quoting *Rodgers* v. *United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976)).

The First Circuit similarly insists upon a "particular factual demonstration of potential harm." *Cryovac*, 805 F.2d at 7.[15]

Here, the District Court expressly found that Kern had failed to carry its burden of establishing "good cause," let alone establish it with particularized and specific demonstrations of fact. Undaunted by this lack of showing, however, the court nevertheless denied Tenneco's disclosure motion, on the basis of unsupported speculation that disclosure could "only result in further delay and may further complicate and extend the present proceedings with no assurance that positive and constructive results will be achieved." App. 29a.[16]

Whatever showing satisfies the "good cause" standard, unfounded speculations of possible administrative inconvenience to the court cannot suffice.[17] The Third Circuit so held in *Cipollone* v. *Liggett Group, Inc.*, 822 F.2d 335 (3d Cir.), *cert. denied*, 108 S. Ct. 487 (1987) (*"Cipollone II"*). In *Cipollone I*, *supra*, the court directed the

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[15] *See CBS, Inc.* v. *United States District Court*, 765 F.2d 823, 825 (9th Cir. 1985), in which then-Judge Kennedy stated for the court, in the context of a third-party request for documents filed in a post-conviction proceeding, that "[t]he interest which overrides the presumption of open procedures must be specified with particularity, and there must be findings that the closure remedy is narrowly confined to protect that interest."

[16] This reason rose up *sua sponte* from the court; after nearly five months of ordered briefings on the motion, not even Kern contended that the spectre of additional delay could meet the good cause standard for Rule 26 and First Amendment purposes.

[17] *See United States* v. *GAF Corp.*, 596 F.2d 10, 15 (2d Cir. 1979) (granting government access to discovery fruits of private litigation, noting, "[n]or are we impressed with the vague suggestion that if the Government obtains copies of documents during the course of litigation, that will somehow obstruct the management of the private litigation"); *Newman* v. *Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) (rejecting concern over impact on docket as justification for denying access to judicial records and hearings).

District Court on remand to consider whether good cause existed for an umbrella protective order, previously entered by a magistrate solely on the basis of case management concerns. *See* 822 F.2d at 342. The District Court on remand held that such concerns could not constitute "good cause", noting that under Rule 26(c) "the focus is on injury to a specific individual, not on general concerns of case administration." 113 F.R.D. 86, 92 (D.N.J. 1986) (quoted in 822 F.2d at 342). The Third Circuit agreed, concluding that the appropriate inquiry is "focused upon the issue of particular need for *party* protection, not upon general concerns of trial efficiency." 822 F.2d at 343 (emphasis in original). Here, the District Court expressly found that Kern—the party seeking protection—failed to establish good cause, and instead the court relied upon "concerns of trial efficiency" in barring disclosure.

B. The Decision Below Conflicts With Decisions From The Third, Sixth, Seventh, And Eleventh Circuits On The Implications Of Umbrella Protective Orders

The District Court also relied upon the umbrella protective order entered into by the parties at the outset of discovery, concluding that "Tenneco is bound by this agreement." App. 27a. The agreement, stipulated to by the parties and signed as "so ordered" by the District Judge, provided that all discovery materials were "deemed" confidential unless the providing party designated otherwise.[18] Such orders are increasingly common—indeed, routine in large and complex litigation.[19] This

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[18] Paragraph five of the agreement provided that a party wishing to disclose the contents of subject documents may seek consent from the opposing party, and that such consent "shall not be unreasonably withheld." If consent is not granted, the agreement specified that the requesting party may move the court for an order permitting disclosure—the course followed by Tenneco. App. 84a-85a.

[19] Judge Becker noted in 1981 that "[w]e are unaware of any case in the past half-dozen years of even a modicum of complexity where

Court has not yet considered the effect of such orders on the "good cause" requirement of Rule 26(c), and the lower courts have adopted sharply conflicting approaches, both before and after *Seattle Times*.[20]

The court in this case assumed that the stipulated umbrella order changed the good cause requirement, shifting the burden to Tenneco to justify disclosure, rather than leaving the burden on Kern to justify barring disclosure of specific documents. It thus upheld a prior restraint barring Tenneco from disclosing the documents, in the face of an undisturbed finding that Kern had failed to demonstrate good cause why disclosure should not be permitted. App. 29a, 48a. There is apparently some support for such an approach.[21]

Most courts, however, recognize that the party resisting disclosure continues to bear the burden of establishing "good cause," even if the documents in question are subject to an umbrella protective order. For example, the

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an umbrella protective order * * * has not been agreed to by the parties and approved by the court." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981). *See Manual for Complex Litigation* § 21.431 (2d ed. 1986); Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 9 (1983) (umbrella protective orders "have become the norm in many areas of federal practice").

[20] The agreement in this case nowhere stated that it was entered into by the parties or ordered by the court for good cause shown.

[21] *See, e.g., GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976); *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D.N.Y. 1972); *Oklahoma Hospital Ass'n* v. *Oklahoma Publishing Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984) (rejecting, without good cause showing, nonparty publisher's request for access to documents produced under stipulated protective order), *cert. denied*, 473 U.S. 905 (1985); *Martindell* v. *IT&T*, 594 F.2d 291 (2d Cir. 1979); *id.* at 298 (Medina, J., concurring); *cf. American Tel. & Tel. Co.* v. *Grady*, 594 F.2d 594 (7th Cir. 1978) (nonparty movant desiring access to protected documents bears higher burden where parties agreed to order), *cert. denied*, 440 U.S. 971 (1979).

Eleventh Circuit recently emphasized that "[u]nder the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party." *In re Alexander Grant*, 820 F.2d at 356. The Third Circuit has noted that "any other conclusion would turn Rule 26(c) on its head," ruling that the umbrella order must as a threshold matter be based on a showing of good cause, and that the party opposing disclosure thereafter has "the burden of proof in justifying the protective order with respect to * * * documents" the other party wishes to disclose. *Cipollone I*, 785 F.2d at 1122.

In *Brown & Williamson Tobacco Corp.* v. *FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the trial judge placed a seal on the entire record in the case, barring one of the parties—the FTC—from disclosing information contained in court documents. The Sixth Circuit reversed, concluding that "the District Court erred by failing to state findings or conclusions which justify nondisclosure to the public." *Id.* at 1176. The court vacated the seal order, concluding that "the natural desire of parties to shield prejudicial information contained in judicial records" did not justify secrecy. *Id.* at 1180.

The Seventh Circuit has similarly refused to give effect to an umbrella protective order when there was no good cause to block disclosure of specific documents. *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). In that case, as here, a protective order was "agreed to by the parties and entered by the district court," but the Court of Appeals nonetheless upheld the District Court's decision to permit disclosure of documents. *Id.* at 1310-16. The appellate court noted that "good cause" for the protective order was never shown—as the District Court in the present case ex-

pressly found—and that in the absence of such a showing disclosure was required. *Id.* at 1311.

Contrary to the District Court in this case, other trial judges have recognized that umbrella protective orders cannot shift the burden of showing good cause under Rule 26(c). *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 101 F.R.D. 34, 44 (C.D. Cal. 1984) ("To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right"). The District Court in *In re "Agent Orange,"* 104 F.R.D. 559, 570 (E.D.N.Y. 1985), noted the conflict on the question, concluding that:

> *Seattle Times* tips the balance in favor of not shifting the burden. The Court in *Seattle Times* approved a limitation on First Amendment rights upon a showing of good cause. In the absence of such a showing, continued protection would violate the First Amendment * * *.[22]

The extraordinary degree to which the courts below infringed upon Tenneco's rights is highlighted by a comparison of the present case with *In re The Reporters Committee for Freedom of the Press,* 773 F.2d 1325 (D.C. Cir. 1985). A divided court in that case held that the press had no right of access to court records until after judgment in the civil case. The court's opinion, by then-Judge Scalia, emphasized that the appropriate analysis might be different "where not an implied right of access but the expressly protected right of 'freedom of speech' was at issue." *Id.* at 1332 n.5. The majority stressed that the case before it involved no closing of the courtroom, and that to the extent documents were revealed in open court they were made public, so there was

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[22] In affirming the District Court, the Second Circuit stated that it "need not reach" the burden of proof issue, because disclosure was warranted regardless of how the burden was allocated. 821 F.2d at 147.

not "the kind of outcry which closing of a trial usually excites." *Id.* at 1337. The court also noted that the protective order in question was based on an affidavit establishing good cause, and that the order specified that the party resisting disclosure continued to bear the burden of showing good cause. *Id.* at 1326.

Here, all of these caveats were ignored. This case involves not a third party's "implied right of access" but Tenneco's expressly protected right to speak and to petition the government. The trial court took the extreme step of evicting the public and closing the courtroom on the basis of the umbrella protective order, entered by stipulation of the parties without any showing of good cause, either *ab initio* or when disclosure was requested by Tenneco.

The courts themselves have noted the persistent conflict and confusion in this area.[23] Indeed, many of the

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[23] *See, e.g., Anderson* v. *Cryovac, Inc.*, 805 F.2d at 6-7 (expressly disagreeing with Third Circuit on implications of *Seattle Times*); *In re "Agent Orange,"* 104 F.R.D. at 568-569 ("A number of cases conclude that on a motion to lift a protective order the burden remains on the party seeking continued protection to show good cause for that continuation. * * * However, another line of authority exists"); *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. at 130-131 (reviewing conflicting precedent); *Sharjah Inv. Co., Ltd.* v. *P.C. Telemart, Inc.*, 107 F.R.D. 81, 83 n.1 (S.D.N.Y. 1985) (noting criticisms of *GAF* and concluding that "[a]lthough there are many similarities between *GAF* and this case, * * * the court will not follow *GAF*"); *Cipollone I*, 785 F.2d at 1121 ("lurking dispute" over good cause); *id.* at 1118 ("unclear whether *Seattle Times* mandated a Rule 26(c) analysis without regard to the first amendment, or whether it required an analysis that included a strict least restrictive means test"); *Continental Illinois Securities Litigation*, 732 F.2d at 1309 n.11 (expressly disagreeing with D.C. Circuit reading of Supreme Court precedent); *Petroleum Products Antitrust Litigation*, 101 F.R.D. at 38 ("these decisions are conflicting with regard to the scope of the right in civil cases and whether it is based upon the common law or derives only from the Federal Rules of Civil Procedure"); *Applications of NBC*, 828 F.2d 340, 351 (6th Cir.

leading cases have been decided by sharply divided panels.[24] The question presented is of continuing practical importance in the handling of complex litigation. As one judge noted, it is "one of the most difficult and vexatious issues judges confront in managing complex litigation—the access and First Amendment rights of litigants and the public in connection with the large quantity of documents that is marked confidential pursuant to a protective order such as is entered to facilitate discovery in virtually every complex case." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. at 872.

This case provides an ideal vehicle for resolving the confusion and uncertainty evident in the lower courts. The express finding by the District Court that Kern had failed to establish good cause presents starkly the question whether such a showing is required in the case of an umbrella protective order, or if the burden has shifted to the other party to show cause for disclosure. There is no

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1987) (Ryan, J., dissenting) ("Some courts appeared to ignore or distinguish *Seattle Times* * * *. Other circuits appear to have followed the apparent mandate of *Seattle Times*").

[24] *See, e.g., Continental Illinois Securities Litigation*, 732 F.2d at 1320 (majority recognizes right to disclose records submitted under an umbrella protective order; Pell, J., dissents: "The phrase 'under seal' would seem to me to be a term of art, a closed door to public dissemination"); *In re Alexander Grant*, 820 F.2d at 358 (majority enforces protective order upon finding good cause; Clark, J., dissents: there was no "consideration by the district court of the public right of access. To the contrary, in this case, the parties, including the public entities, stipulated to the consent order"); *In re Reporters Committee*, 773 F.2d at 1342, 1347 (Wright, J., dissenting, describing majority opinion as "[c]ontrary to the view of other United States Courts of Appeals" and stating, "I find myself in agreement with those Courts of Appeals that have found that the First Amendment provides a presumptive right of contemporaneous access to materials admitted into evidence in a civil proceeding"); *Cipollone II*, 822 F.2d at 347-349 (Garth, J., dissenting, on ground that District Court failed to enter express findings on "good cause").

confusion on that finding; the District Court entered it when barring disclosure before trial, and affirmed it in finally granting disclosure after decision. App. 29a, 48a. Nor is this case complicated by questions of third party access; the holding "falls directly within the text of the constitutional provision" concerning Tenneco's "expressly protected right of 'freedom of speech.'" *In re Reporters Committee*, 773 F.2d at 1332 n.5. There is no issue of potential abuse of the discovery process. Tenneco did not even seek to disclose the "smoking gun" documents publicly, but only to turn them over to the responsible federal agency, DOE, and Kern conceded that DOE would keep the documents confidential. App. 25a. The extent of the District Court's prior restraint is also starkly presented, with the extreme step of evicting the public and closing the courtroom. And there is no doubt about the practical effects of the court's action: as soon as Tenneco was able to disclose the documents to DOE, that agency entered a Proposed Order finding, in direct contrast to the District Court ruling, that Kern had violated the entitlements program.

C. The Decision Below Violates Public Policy

The District Court, in effect, allowed its good offices to become involved in a coverup. Only a court order prevented Tenneco from doing its public duty and passing on to DOE documents establishing that Kern had committed fraud on that agency. Every day of delay in disclosing the information allowed the concealment of the fraud from DOE to be perpetuated. The result was not only the denial of Tenneco's rights but a direct contravention of the public policy requiring each citizen promptly to inform the Government when it is being defrauded. A logical extension of the ruling below would mean, for example, that while two parties litigated over responsibility for a tax payment, one of the parties could be prevented from revealing to IRS uncontradicted evidence that the other had cheated on the very taxes at issue.

Public policy commands a different view. It must be that no court, absent the most dire circumstances, can prevent a party to a lawsuit from reporting to the United States Government demonstrated facts showing that the Government is being defrauded. This was not a case, after all, where the Government already possessed the relevant information and could, through its own vast resources, obtain the documents itself;[25] where the evidence was given under Fifth Amendment assumptions that it would *not* be turned over to the Government;[26] or where civil discovery was being used illicitly to obtain information for governmental purposes.[27] Here, totally unbeknownst to the Government, evidence of fraud appeared in the record of a case to which it was not a party, and even the fact of fraud could not be transmitted to the Government, although the protective order had never been designed to anticipate and foreclose such disclosure. Nor were these inadvertent, technical exceedances of some arcane set of principles. These were deliberate violations of serious and specific laws and regulations with which this long-operative and experienced oil refiner was thoroughly familiar.

This Court should resolve the conflict and confusion over this subject and hold that courts are not free to enforce protective agreements that violate public policy.[28] Under circumstances like these, a litigant "may make any lawful use of the information which comes to light during this proceeding."[29] Indeed, he has an obligation to do so, and no court should stand in his way.

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[25] *Cf. GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. at 132; *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. at 44.

[26] *Cf. Valentin* v. *Richardson*, 110 F.R.D. 622, 628 (D. Mass. 1986).

[27] *Cf. Essex Wire Corp.* v. *Eastern Electric Sales Co.*, 48 F.R.D. 308, 312 (E.D. Pa. 1969).

[28] *See W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 766 (1983).

[29] *Essex Wire Corp.*, 48 F.R.D. at 312.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-6674; 87-5743

D.C. Nos. CV-81-3253-LEW; CV-81-6875

KERN OIL & REFINING CO.,
Plaintiff/Counter-Defendant/Appellee,

v.

TENNECO OIL COMPANY,
Defendant/Counter-Claimant/Appellant.

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted
December 10, 1987—Pasadena, California

Filed March 7, 1988

Before: Joseph T. Sneed and Harry Pregerson, Circuit Judges, and William A. Ingram,* District Judge

Opinion by Judge Sneed

James R. Martin, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendant/counter-claimant/appellant.

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* Honorable William A. Ingram, United States District Judge, Northern District of California, sitting by designation.

Richard E. Sherwood, O'Melveny & Myers, Los Angeles, California, for the plaintiff/counter-defendant/appellee.

OPINION

SNEED, Circuit Judge:

Tenneco Oil Company appeals from a district court judgment awarding $32 million in damages, interest, and attorneys' fees to Kern Oil & Refining Company for Tenneco's breach of contract and fraud. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

Kern Oil & Refining Company (Kern) is a crude oil refiner whose refinery is located in Bakersfield, California. Kern has no crude oil production of its own and therefore must acquire from others the crude it runs through its refinery. Tenneco Oil Company (Tenneco) is an "integrated" oil company with crude production in California and elsewhere, a refinery in Louisiana, and marketing facilities around the country.

In October 1975, Kern and Tenneco agreed that Kern would purchase oil from Tenneco's fields in Yowlumne, California. As Tenneco brought new Yowlumne fields into production, it sold most of that oil to Kern as well. In May 1977, Kern and Tenneco entered into a contract that formally committed Tenneco to sell Kern all crude produced by Yowlumne properties from which Kern was already purchasing crude.[1] The trial court found that at about the same time, "Kern and Tenneco orally agreed that Tenneco would sell to Kern, under the terms of the May 1977 contract, crude from all Yowlumne properties coming into production after May 1977." Findings of Fact and Conclusions of Law, Excerpt of Record (E.R.) at 263.

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[1] Kern and Tenneco agreed that Texas law would govern disputes as to this and subsequent contracts between them.

Circumstances changed in the spring of 1978. Tenneco then learned that a pipeline would soon be open which could transport Tenneco's Yowlumne crude across the Rockies. From east of the Rockies, the oil could be easily traded for crude supply for Tenneco's Louisiana refinery. The court found that "Tenneco wanted to keep for itself the Yowlumne crude that it had agreed to sell to Kern." E.R. at 265. Tenneco faced two obstacles in attempting to keep the Yowlumne oil for itself.

The first obstacle was a practical one pertaining to Tenneco's access to the new pipeline. Tenneco's only way to the new pipeline was through a small Texaco pipeline, to which Tenneco did not have access. Kern, however, did have a contractual right to use the Texaco pipeline. Therefore, Tenneco proposed to Kern that Kern transport Tenneco's oil through the Texaco pipeline. This proposal also brought into focus the second obstacle—Kern's contractual and regulatory claims to Tenneco's Yowlumne oil. Because at the time of this proposal Tenneco's Yowlumne fields were producing more oil than Kern could refine, it did not meet with a flat rejection. Kern argued at trial that Tenneco met its concerns by fraudulently promising Kern that Tenneco would not leave Kern without a sufficient supply for Kern's refinery. Relying on that promise, and believing that it was not jeopardizing its own supply, Kern agreed in July 1978 to transport some of Tenneco's Yowlumne crude through the Texaco pipeline. Tenneco's interpretation of the July 1978 contract substantially differs from Kern's. Tenneco argued at trial that the May 1977 contract already gave Kern title to Tenneco's Yowlumne oil, and that the July 1978 contract was not a transportation agreement but a straight sale of some of the Yowlumne oil back to Tenneco. The district court agreed with Kern, and found that the July 1978 contract was a transportation agreement, which Tenneco fraudulently induced Kern to sign.

By January 1979, Kern was aware that Tenneco did not agree with Kern's interpretation of the May 1977

and July 1978 contracts, and did not intend to supply the Kern refinery's needs. This became of greater importance to Kern than previously because it contemplated expanding its refinery capacity. In February 1979, Kern filed a complaint with the U.S. Department of Energy alleging that Tenneco had violated federal regulations. In the same month, Kern and Tenneco replaced the July 1978 agreement with an explicit transportation agreement, "fulfilling the same function and serving the same purpose as the July 1978 agreement." E.R. at 269. The February 1979 agreement was not intended to affect any claims either party might have under the earlier agreements. It remained in effect until 1981.

Tenneco's conduct did not damage Kern until April 1979, when Kern completed the expansion of its refinery. From April 1979 through November 1980, Kern would have processed nearly two million barrels of the Yowlumne crude that Tenneco failed to deliver. As a result, it lost nearly $17 million in profit.

In July 1981, five months after the filing by Kern of a suit against Tenneco alleging that Tenneco overcharged Kern under the May 1977 contract, Kern filed a complaint against Tenneco in the Central District of California alleging violations of federal regulations. In December 1982, Kern filed a complaint based on the same acts and alleging contractual breaches. In 1983, the district court consolidated the two latter complaints. The overcharge case proceeded separately.

This case was tried in December 1985 and January 1986. In November 1986, the court entered judgment for Kern and awarded it some $32 million in damages, interest, and attorneys' fees, including sanctions under Federal Rule of Civil Procedure 11. The court held that by failing to sell Kern all of the oil produced by the Yowlumne fields in question, Tenneco violated the Mandatory Petroleum Allocation Regulations, 10 C.F.R. Pt. 211 (1987), and breached the May 1977 contract. E.R. at

276-85. In addition, the court held that Tenneco had committed fraud and misrepresentation in convincing Kern to sign the July 1978 contract. E.R. at 285-86.

Tenneco appealed the decision on the regulatory cause of action to the Temporary Emergency Court of Appeals and the decision on the contractual causes of action to this court.

II.

JURISDICTION

The district court had diversity jurisdiction under 28 U.S.C. § 1332 (1982). This court's jurisdiction rests on 28 U.S.C. § 1291 (1982).

III.

DISCUSSION

Tenneco presents numerous arguments. Their descriptive designations, which this opinion will employ, are as follows:

A. Absence of Jurisdiction of District Court to Enter Findings of Fact and Conclusions of Law.

B. Grounds for Dismissal of Kern's Claims.

   1. Res Judicata.

   2. Statute of Limitations.

   3. Waiver by Kern's Course of Performance.

C. Damages Erroneously Determined.

   1. 90-Day Notice Period as a Limitation on Damages.

   2. Kern's Duty to Mitigate.

   3. Evidentiary Support for Damages.

D. Prejudgment Interest Not Allowable.

E. Rule 11 Sanctions Not Proper.

We now turn to these arguments in the order set out above.

A. *Absence of Jurisdiction of District Court to Enter Findings of Fact and Conclusions of Law*

On October 10, 1986, the district judge signed his findings of fact and conclusions of law, as well as his final judgment. The latter was filed on November 5 but the findings of fact and conclusions of law were not entered until November 24, 1986. Tenneco's notice of appeal was filed on November 21, three days before the findings and conclusions were entered.

Tenneco argues that filing its notice of appeal stripped the district court of its jurisdiction to enter findings of fact and conclusions of law. It is true that filing a notice of appeal usually divests the district court of jurisdiction over the matters appealed. *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982). We have, for example, refused to consider amended findings of fact and conclusions of law filed after a notice of appeal. *See Sumida v. Yumen*, 409 F.2d 654, 656-57 (9th Cir. 1969).

This divestiture of district court jurisdiction does not rest on a statute. *See Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). Rather, it is a "judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes nor to induce needless paper shuffling." 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 203.11, at 3-45 n.1 (2d ed. 1987). Tenneco's arguments would "induce needless paper shuffling." Our acceptance of Tenneco's position would not lead to a decision on the merits for Tenneco but only to a remand to the district court to file its findings and conclusions. Another appeal would

then be taken by Tenneco and next year, perhaps, we would get the case back. A better example of "needless paper shuffling" would be hard to imagine.

This case differs from *Sumida, supra*, in which the district court filed both an order and findings and conclusions, and, after the notice of appeal was filed, attempted to amend both. We properly treated the appeal as one from the earlier filed order. The appellate court is entitled to review a fixed, rather than a mobile, record. Here the district court did not attempt to move the target; it merely set one in place. It is clear to us that the findings and conclusions were intended to be filed at the same time as the final judgment. We will treat them as having been so filed.

Tenneco insists that it was deprived of its opportunity to move for amended findings and conclusions, Fed. R. Civ. P. 52(b), and to move for a new trial or an amended judgment, Fed. R. Civ. P. 59(b), (e). We are unpersuaded. Tenneco knew that the district court was preparing findings and conclusions; indeed, it had filed a lengthy memorandum in opposition to Kern's proposed findings and conclusions. Neither did it inform the court that it had not received the findings and conclusions nor did it ask for an extension of time. Doing neither of these things indicates that Tenneco was unconcerned about the deadlines for a Rule 52 or 59 motion and suffered no harm by the late filing. To remand to the district court to enable Tenneco to file still another opposition, styled a motion to amend, to the same findings and conclusions would be pointless.

Tenneco also complains of the district judge's near-complete acceptance of the findings and conclusions prepared by Kern. In *Unt v. Aerospace Corp.*, 765 F.2d 1440 (9th Cir. 1985), this court said, "We have previously disapproved of the mechanical adoption of findings and conclusions prepared by the victorious party. The verbatim adoption of findings suggested by a party is not auto-

matically objectionable, however, so long as those findings are supported by the record." *Id.* at 1444-45 (citation omitted). Tenneco points to no evidence to show that the findings and conclusions were not supported by the record.

B. *Grounds for Dismissal of Kern's Claims*

1. *Res Judicata*

We have already mentioned the regulatory case now on appeal to the Temporary Emergency Court of Appeals. In addition to that case there was yet another. In January 1981, five months before the filing in the case, Kern filed suit against Tenneco in district court, alleging that Tenneco breached the May 1977 contract by charging excessive prices. In the summer of 1984, Kern received a judgment in its favor. This court affirmed the judgment in *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987). We shall refer to this, the earlier case, as the "price case," and to the case before us as the "supply case."

Tenneco now invokes res judicata and argues that the price case should bar recovery by Kern in the supply case. Kern responds that Tenneco has waived its right to invoke res judicata. We review this issue *de novo*. *See Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984).

Tenneco's principal obstacle is Fed. R. Civ. P. 8(c), which includes res judicata as an affirmative defense that must be raised in the pleadings. Tenneco admits that it did not do so. Therefore, the defense is waived. *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 n.1 (9th Cir. 1978); *Weekes v. Atlantic Nat'l Ins. Co.*, 370 F.2d 264, 271 (9th Cir. 1966); *Hernandez v. Heckler*, 621 F. Supp. 439, 442 n.2 (N.D. Cal. 1985).

It is true that we have allowed a party to raise res judicata after the initial pleadings by construing the at-

tempt as a motion to file a supplemental answer. *See Harbeson*, 746 F.2d at 520. This does not help Tenneco because we have always required that it be raised before trial. Tenneco did not raise it until after the end of the trial.[2] Moreover, Tenneco, by never objecting to separate trials of the price and supply cases,[3] cannot now object to their being split. *Restatement (Second) of Judgments* § 26(1)(a) (1982).[4]

2. *The statute of limitations*

Tenneco next invokes statutes of limitations with respect to Kern's contract and fraud claims. The contract claim is subject to a four-year statute of limitations, Tex. Bus. & Com. Code Ann. § 2.725 (Vernon 1968), and the fraud claim is subject to a three-year statute of limitations. Cal. Civ. Proc. Code § 338(4) (Deering 1972). The contract claim was filed in December 1982, and the complaint was amended to include a fraud claim in September 1983. The date of accrual of these claims is disputed. Tenneco asserts that the contract claim ac-

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[2] In July 1986, two years after the district court's decision in the price case, seven months after the court had ruled in Kern's favor on the liability issues in the supply case, and immediately after we affirmed the price case, Tenneco moved the court to dismiss Kern's claims on res judicata grounds. The court pointed out that Tenneco had not needed to wait until the appeal of the price case was decided to bring up the issue. E.R. at 1893. *See Restatement (Second) of Judgments* § 13 comment (f) (1982).

[3] From January 1983 to June 1984, the price case and the supply case were both before federal courts in the Central District of California. Tenneco never moved to consolidate them. In a hearing in October 1984, Judge Waters asked the parties why the cases had never been consolidated and a Tenneco attorney replied, "the parties both seemed to think that that was the way to proceed, the supply issues being tried here and the price issues being tried in the other case." E.R. at 1869.

[4] Because of our resolution of this issue, we need not reach Kern's argument that the price case and the supply case did not involve the same cause of action.

crued by June 1978, when the breach of contract occurred, and that the fraud claim accrued by February 1979, when Kern admittedly was aware of the fraud. Thus, as Tenneco sees it, both claims are barred by limitations.

The district court rejected those accrual dates and found that Kern's contract claim did not accrue until January 1979. We choose a different course. We conclude that under Federal Rule of Civil Procedure 15 the fraud and contract claims relate back to Kern's regulatory complaint filed in July 1981, and are therefore not barred by the statute of limitations.

Rule 15(c) states that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Rule 15 allows relation back even when the original claim is itself time barred. *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982).

Tenneco argues that the initial claim must give the defendant "fair warning that he might later be accused of some other offense than that raised in the first pleading." Tenneco is incorrect. Under Rule 15, the only question is whether the later claims arise out of the conduct, transaction, or occurrence brought to the defendant's attention by the initial claim. When this is so later-filed claims may relate back, even if they rest on a different legal theory than that of the first claim. *See Santana*, 686 F.2d at 739; *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1259-60 n.29 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); 3 J. Moore, *Moore's Federal Practice* ¶ 15.15[3], at 15-151 (2d ed. 1987).

The regulatory, contract, and fraud claims did arise out of the same factual situation. In its initial complaint,

Kern alleged that Tenneco had a obligation under DOE regulations to sell Kern all of its Yowlumne oil, and that beginning in June 1978 Tenneco breached that obligation. The complaint thus put Tenneco on notice that Kern believed it had a right to all of the Yowlumne oil. Kern's later claims only added other legal theories to support its asserted right. Thus, Kern's initial claim rests on the same conduct that supports Kern's contract and fraud claims.

3. *Waiver by Kern's Course of Performance*

Tenneco argues that Kern's course of performance under the May 1977 and July 1978 contracts dooms its claims. First, Tenneco argues that Kern's course of performance is inconsistent with the claim that Tenneco breached the May 1977 contract. Second, Tenneco argues that Kern waived its contractual rights by not notifying Tenneco of the alleged breach.

Our standard of review in matters of this kind is not simple. Our position is as follows: "When the district court's decision is based on an analysis of the contractual language and an application of the principles of contract interpretation, that decision is a matter of law and reviewable de novo. When the inquiry focuses on extrinsic evidence of related facts, however, the trial court's conclusions will not be reversed unless they are clearly erroneous." *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985). The question of waiver of a contractual right is also a question of fact and subject to the clearly erroneous standard. *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 (9th Cir. 1983).

The district court found that from April 1979 to November 1980, Kern experienced a shortage of crude oil because Tenneco was not performing its obligations under the May 1977 contract. While it is undisputed that Tenneco delivered to Kern title to all of the Yowlumne oil, Kern received title, after July 1978, to some of the oil

solely for transportation purposes,[5] pursuant to a contract Tenneco fraudulently induced Kern to sign.[6] Therefore, when Kern experienced a shortage of oil, its sales of oil back to Tenneco under the terms of the transportation agreement neither evidenced satisfaction of Tenneco's contractual obligations nor were they a waiver of Kern's rights under the May 1977 contract. Moreover, a party's continued performance subsequent to defective performance by the other party does not waive the performing party's contractual rights as long as he complies with notice requirements. *See Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

Tenneco argues, however, that Kern did not comply with notice requirements, and that §§ 2.208 and 2.607 of the Tex. Bus. & Com. Code (Vernon 1968) bar Kern from recovering under the contract.[7] The district court

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[5] Tenneco disputes the district court's finding that the July 1978 contract was a transportation agreement. We apply the clearly erroneous standard, because the district court looked to the parties' intent in agreeing to the contract. The finding was far from clearly erroneous.

[6] Tenneco argues that because Kern argued in its initial complaint before the Department of Energy that Tenneco coerced Kern into signing and performing under the July 1978 contract, Kern cannot now argue that it was defrauded into signing and performing under the contract. Tenneco does not attack the factual findings of the district court that "Tenneco assured Kern that Tenneco would not leave Kern without a sufficient refinery supply"; that "Tenneco's objective was eventually to take all of the Yowlumne production for itself, but it concealed that intent from Kern"; and that "Tenneco induced Kern to enter into the July 1978 agreement by falsely representing to Kern that Tenneco would continue supplying Kern with sufficient Yowlumne crude to meet Kern's refinery needs." E.R. at 266-67. These findings are not clearly erroneous, and support Kern's fraud claim. Tenneco cites no suport for the proposition that Kern's having argued a different basis for relief before a different court in a different action should defeat its claim here.

[7] Section 2.208 states:

(a) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of

found that "Kern protested Tenneco's continuing breach of supply obligations at the inception and during the entire lifespan of the February 1979 agreement." E.R. at 269.

Section 2.607's notice requirement should not be applied stringently. "As is noted in the draftsmen's comments, 'the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.' . . . [N]otice under section 2.607 need not be a specific claim for damages or an assertion of legal rights." *Eastern Air Lines*, 532 F.2d at 976; *see Reynolds Metals Co. v. Westinghouse Elec. Corp.*, 758 F.2d 1073, 1078 (5th Cir. 1985) (§ 2.607's notice requirements "are not stringent and are liberally construed by the Texas courts"); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 889 (Tex. Civ. App. 1979).[8]

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the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

. . .

(c) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

Section 2.607(c) states "[w]here a tender has been accepted (1) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ."

Tenneco bases its arguments primarily on § 2.607. We therefore do likewise.

[8] In addition, we note that the notice provisions of the U.C.C. were not designed for a heavily regulated, monopolistic relationship of the type that existed between Kern and Tenneco. Under the DOE regulations, the parties found themselves in a relationship that neither could easily leave. They signed and performed under the February 1979 contract, for example, at the same time that they were disputing claims against one another. We agree with the Fifth Circuit that even when two parties are effectively "married," "the

The good faith of the buyer is the "governing criterion" under the section. *Eastern Air Lines*, 532 F.2d at 977.

We hold that Kern gave Tenneco good faith notice of its contractual breach.[9] First, Kern raised the subject of Tenneco's contractual obligation before a January 1979 meeting with Tenneco. Second, Kern gave Tenneco ample notice of Tenneco's breach of its regulatory obligations. The regulatory breach was very closely related to the contractual breach. The regulations only applied because Tenneco had contracted to sell oil to Kern. Therefore, the underlying purposes of the section were accomplished: Tenneco knew that Kern was dissatisfied with its tender of goods, and the two parties had opportunity to negotiate their differences. *See Eastern Air Lines*, 532 F.2d at 976; *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 361 (5th Cir. 1980).

C. *Damages Erroneously Determined*

1. *90-day Notice Period As a Limitation of Damages*

The May 1977 contract allowed either party to terminate the contract without cause after a 90-day notice period. Tenneco argues that when a contract allows termination by either party without cause, damages for a material breach are limited to those that would accrue during the damage period.

Tenneco states this proposition too broadly. It applies when one party has ceased all performance under a contract. Under these circumstances the notice period will determine the proper amount of future damages. *See, e.g., Cottman v. State Dep't of Natural Resources*, 51

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buyer must decide whether the benefits of claiming a breach of contract outweigh the need for a close rapport with the seller." *Eastern Air Lines*, 532 F.2d at 979 n.62. But we should not expect a married party to complain as loudly as one who is free to play the field.

[9] We therefore find it unnecessary to reach Kern's argument that Tenneco waived its notice argument by not raising it below.

Md. App. 380, 443 A.2d 638 (Md. Ct. Spec. App. 1982); *Student Transit Corp. v. Board of Educ.*, 76 Ill. App. 3d 366, 395 N.E.2d 69 (1979). But the damages due to a continuing partial breach are not limited to the contract's notice period. Such a breach is not the equivalent of a cessation of all performance.

2. *Kern's Duty to Mitigate Damages*

Tenneco sold some of the Yowlumne oil (referred to as Section 33/34 oil) to third parties at uncontrolled prices. Kern had the right to purchase this oil at controlled prices, which were much lower than uncontrolled prices. Tenneco argues that if Kern had asserted its right to purchase the Section 33/34 oil at controlled prices, Tenneco would have immediately terminated the May 1977 contract, thereby greatly reducing its damages. Despite its resemblance to the refrain, "You made me love you, I didn't want to do it," Tenneco argues that the district court erred in refusing to hear its offer of proof as to this point.

"Trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. A reviewing court will not reverse for an abuse of discretion unless it has a definite and firm conviction that the court below committed an error." *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir. 1986) (citation omitted).

The district court did not abuse its discretion. Kern produced evidence that Tenneco concealed Kern's right to purchase the Section 33/34 oil. As Kern points out, because it did not know it had the right to purchase the oil, it could not have protested Tenneco's selling the oil to others. It was Tenneco, not Kern, who caused Kern not to purchase Section 33/34 oil. Therefore, it was not an abuse of discretion for the district court to conclude that Tenneco's offer of proof was irrelevant.

3. *Evidentiary Support for Damages*

This court "will not disturb an award of damages on appeal unless it is clearly unsupported by the evidence." *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985). Tenneco makes two contentions that the evidence does not support the award of damages. First, it argues that the Energy Department's post-trial proceeding against Kern demonstrates that some of the evidence Kern relied on in computing its damages was incorrect. Second, it argues that Kern's damage claim was speculative.[10]

Tenneco, relying on the linkage between the regulatory and this proceeding, says that it "discovered documents which demonstrated that Kern had systematically defrauded the Department of Energy by engaging in a series of illegal transactions which substantially reduced Kern's obligation under the DOE regulations to purchase 'entitlements' on price-controlled crude oil it refined." Tenneco argues that because the district court did not allow it to reveal these documents to the DOE until after the trial, the court based its award of damages on incorrect assumptions as to Kern's rights to purchase entitlements. The short answer to this argument is that the district court allowed Tenneco to produce at trial the evidence it later submitted to the DOE. Kern argued at trial that even if the Department of Energy held that Kern had acted unlawfully it would not revoke Kern's unused exception relief eligibility, which excused Kern from having to purchase entitlements for the Yowlumne oil. The district court therefore had this dispute directly before it. We cannot say that its resolution of the dispute was unsupported by the evidence.

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[10] In addition, Tenneco captions one of its headings "The Court Violated Tenneco's First Amendment Rights By Preventing It From Petitioning The Department Of Energy." Appellant's Brief at 38. Tenneco never discusses this rather eye-opening contention.

Tenneco points to Kern's statement of objections to the DOE Proposed Remedial Order that resulted from Tenneco's disclosure of documents to the DOE, and argues that Kern's statement directly contradicts the district court's findings underlying its damage award. In particular, Tenneco argues that although Kern argued to the district court, and the district court found, that Kern would have refined, not sold, the Yowlumne oil it should have received from Tenneco, E.R. at 271, Kern is now arguing before the DOE that Kern would not have processed the oil, but would have sold it. The district court heard a great deal of evidence on how Kern would have disposed of the oil it did not receive. It concluded that "[h]ad the Yowlumne crude been made available to Kern, sound business practice dictates that it would have been processed by Kern and not sold." E.R. at 256. That Kern is now arguing a different theory to a different tribunal certainly weakens its new position, but it does not make the district court's earlier conclusion clearly unsupported by the evidence.

Tenneco argues that because Kern's damage theories changed several times during trial, its final damage claim must have been speculative. It points to nothing else in the record to support this conclusion. While inconstancy of theories may suggest the weakness of each, a damage award is not speculative merely because of such inconstancy.

4. *Prejudgment Interest Not Allowable*

The district court awarded Kern equitable prejudgment interest at the rate of ten percent. Tenneco argues that Texas law precludes an award of equitable prejudgment interest when a statute sets the rate. It then points to Tex. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1987), which provides that prejudgment interest on "accounts and contracts ascertaining the sum payable" shall be six percent.

Texas courts disagree over whether art. 5069-1.03 prevents courts from awarding equitable prejudgment interest at a higher rate than six percent on "contracts ascertaining the sum payable." Some courts have held that it does. *See, e.g., Baker Marine Corp. v. Weatherby Eng'g Co.*, 710 S.W.2d 690, 695 (Tex. Ct. App. 1986); *Missouri-Kansas-Texas RR. v. Fiberglass Insulators*, 707 S.W.2d 943, 945 (Tex. Ct. App. 1986). The district court held that Texas law allows courts to set equitable prejudgment interest rates even in cases to which art. 5069-1.03 applies. We agree.[11]

Like the district court, we rely on *Crown Central Petroleum Corp. v. National Union Fire Ins. Co.*, 768 F.2d 632 (5th Cir. 1985). In *Crown Central*, the Fifth Circuit canvassed Texas law and concluded that "the availability of statutory prejudgment interest in no way foreclose[s] an award of equitable prejudgment interest." *Id.* at 637; *see Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 485 (Tex. 1978).[12]

Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985), instructs courts awarding pre-

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[11] We note that several Texas courts have avoided this debate by narrowly construing the scope of the phrase "contracts ascertaining the sum payable." *See, e.g., McCann v. Brown*, 725 S.W.2d 822, 825 (Tex. Ct. App. 1987); *Perry Roofing Co. v. Olcott*, 722 S.W.2d 538, 544 (Tex. Ct. App. 1986), *aff'd*, 31 Tex. S. Ct. J. 213, Feb. 13, 1988 (Tex. Feb. 10, 1988). Our resolution of this issue makes it unnecessary for us to determine whether the contract in this case is one "ascertaining the sum payable."

[12] In *Perry Roofing Co. v. Olcott*, 31 Tex. S. Ct. J., Feb. 13, 1988 (Tex. Feb. 10, 1988), the Texas Supreme Court held that courts could award prejudgment interest at the equitable, ten-percent rate in cases that involve contracts not ascertaining the sum payable—that is, contracts to which art. 5069-1.03 could not apply. The Court did not address whether courts had discretion to award equitable interest in cases inolving contracts that do ascertain a sum payable. We therefore continue to be guided by *Crown Central* and *Phillips Petroleum*.

judgment equitable interest to look at Tex. Civ. Stat. Ann. art. 5069-1.05 (Vernon 1987) to determine the interest rate.[13] Thus, the district court correctly awarded ten percent interest pursuant to *Cavnar* and art. 5069-1.05.[14]

5. *Rule 11 Sanctions Not Proper*

The district court awarded Rule 11 sanctions to Kern for "attorneys' fees and costs incurred in resisting defendant's post-trial motions heard on August 4, 1986." E.R. at 196. Tenneco made three motions on August 4: (1) to dismiss Kern's regulatory claim on the ground that the Emergency Petroleum Allocation Act of 1973 (EPAA) is unconstitutional; (2) to dismiss Kern's claims on the res judicata grounds discussed in III. B. 1 above; and (3) to unseal the trial transcript and exhibits so that Tenneco could release documents about possible Kern wrongdoing to the Department of Energy. Tenneco now argues that the district court erred in awarding sanctions to Kern for these motions.

The underlying facts the district court relied upon in making its determination are not in dispute. We therefore review *de novo* the district court's legal conclusions about the applicability of Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986).

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[13] *Cavnar* is a tort case, but its reasoning as to interest rates applies to all equitable interest cases. *See Crown Central*, 768 F.2d at 638; *McCann*, 725 S.W.2d at 825-26.

[14] Tenneco argues that any legislative attempt to impose a higher interest rate on parties to a contract after the parties have entered the contract would be unconstitutional under the Supreme Court's decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). It argues further that this court should hold that the Texas Supreme Court is similarly prevented from imposing new interest rates for contract damages after the parties agreed to the contract. Tenneco does not dispute Kern's contention that Tenneco did not raise this issue below. We therefore decline to review it. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985).

The EPAA, under which the regulations in question in Kern's regulatory claim were promulgated, includes a legislative veto provision. In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court declared the legislative veto unconstitutional. The Temporary Emergency Court of Appeals (TECA) has held that the EPAA is constitutional on two separate grounds: (1) the legislative veto provision is severable from the rest of the act; and (2) *Chadha* does not apply retroactively to the act. *See, e.g., United States v. Exxon Corp.*, 773 F.2d 1240 (T.E.C.A. 1985), *cert. denied*, 474 U.S. 1105 (1986).

In its August 1986 motion, Tenneco rejected TECA's position and argued that the EPAA was unconstitutional because the legislative veto could not be severed from the rest of the statute. It argued that, although the TECA had not changed its position or been overruled on the question of severability, the question was open because the Supreme Court had just granted certiorari in *Alaska Airlines, Inc. v. Brock*, 106 S. Ct. 1259 (1986). We need not reach the question whether the grant of certiorari in *Alaska Airlines*, a case that did not involve the EPAA, would justify Tenneco's petitioning the district court to disregard the position of the TECA. Tenneco's motion did not discuss, or even mention, TECA's alternative holding that the EPAA could stand on retroactivity grounds. This Tenneco should not have done. The trial court's award of Rule 11 sanctions for this motion was justified because the motion, by ignoring a portion of existing law, was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11.

Tenneco's res judicata arguments before the district court are identical to its res judicata arguments before this court, and have been discussed. The arguments do not support Tenneco's position. Rule 11 sanctions were justified because Tenneco had acquiesced to the claim splitting for nearly four years before it made the motion.

The trial court granted Tenneco's request to unseal the trial transcript. It therefore seems unlikely, to say the least, that the court also awarded sanctions against Tenneco for making the motion. Unfortunately, however, the court's order refers only to the motions of August 4, and does not specify which motions it covers. E.R. at 196. Nevertheless, after the court awarded Kern sanctions, Kern did not ask for attorneys' fees for time spent defending this motion. Because Tenneco did not have to pay sanctions in the form of fees for making this motion, the district court's imprecision in specifying the motions for which sanctions were appropriate becomes moot.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-6674, 87-5743

KERN OIL & REFINING CO.,
Plaintiff-Appellee,

v.

TENNECO OIL COMPANY,
Defendant-Appellant.

[Filed May 19, 1988]

Before: SNEED and PREGERSON, Circuit Judges, and INGRAM*, District Judge.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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* Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A88-74

TENNECO OIL CO.,

Applicant

v.

KERN OIL and REFINING CO.

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 16, 1988.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 3rd day of August, 1988.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 81-3253 LEW(Gx)
CV 82-6875 LEW(Gx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant,

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Sept. 6, 1985]

ORDER RE TENNECO'S MOTION
FOR DISCLOSURE OF DOCUMENTS

On May 10, 1985, this Court heard Tenneco's motion to disclose to the Department of Energy ("DOE") certain documents produced by Kern during discovery. Dissemination of these documents was limited by a broad stipulated protective order issued February 1, 1984. By its

motion, Tenneco sought to remove these documents from the scope of that order.

Following oral argument, this Court issued an order requiring Tenneco to specify each document which it desired to disclose. Kern was then to "provide a specific showing of good cause pursuant to Rule 26(c) of the Federal Rules of Civil Procedure as to why those documents identified by Tenneco should be protected from disclosure." Tenneco was given an opportunity to oppose Kern's showing, and the matter was to stand submitted as of that time.

On June 3, 1985, Tenneco filed under seal copies of those documents sought to be disclosed. On June 14, Kern filed a document entitled "Supplemental Memorandum of Kern Oil & Refining Co. in Opposition to Tenneco Oil Company's Motion for Disclosure of Documents." Contrary to this Court's order, Kern elected not to make its showing of good cause. The reason for this was stated by Kern as follows:

> Kern does not here address the confidential nature of the documents identified in Tenneco's supplemental memorandum because the risk of prejudicial disclosure of that information to Kern's competitors, suppliers and customers has been reduced by Tenneco's change of strategy in now seeking to disclose those documents *only* to the government. Kern concedes that it could probably prevail upon the DOE not to disclose the documents to the public. By so conceding, however, Kern does not abandon its previous position that the documents contain confidential commercial information.

Supplemental Memorandum of Kern Oil & Refining Co. in Opposition to Tenneco Oil Company's Motion for Disclosure of Documents (hereinafter "Kern's Supplemental Memo"), p. 1 (Emphasis in original). Although no supporting authority is cited, Kern apparently has con-

cluded that Rule 26(c) provides no grounds for protecting confidential commercial information if, in fact, that information will not reach the commercial public. The Court expresses no view on this conclusion.

Having occupied the position that a Rule 26(c) showing was of no assistance to it, Kern returned to the substance of the underlying motion. It argued that Tenneco's "change of strategy" brought to bear a line of decisions holding that "a party which has received documents in the course of discovery in a lawsuit with the understanding that they were to be used solely for litigation in that action cannot voluntarily disclose those documents to an agency of the Government for purposes of the agency's investigation of the party which produced the discovery." Kern's Supplemental Memorandum, p. 2. The leading case in this line is *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976). On June 19, Tenneco filed its own Supplemental Memorandum noting Kern's failure to present any showing of good cause but addressing the new arguments raised.

Kern's most recent filing is somewhat puzzling. This Court has always been under the impression that Tenneco sought to disclose the documents in question only to the DOE. Tenneco states that this is, in fact, the case. Kern cites nothing to support its claim that Tenneco somewhere changed its strategy. This Court, however, sees no reason to penalize Kern for its prior confusion and will thus treat its Supplemental Memorandum as a motion for reconsideration.

The Court has reviewed the cases cited by Kern, in particular the *GAF* opinion. Given the particular facts of the instant case, the relevant holding of this line of cases states that a party shall be bound by the terms of an agreement not to disclose documents produced in the course of litigation. The Court fully agrees with this. Here, the parties have agreed by stipulation that confidential commercial information produced in discovery

shall not be disclosed. Tenneco is bound by this agreement.

Kern shall be given one final opportunity within seven days from the filing of this order, to make its showing that the disputed documents do contain such information. It is not relevant to this showing that the document will never reach the public. If the information contained in the documents is still commercially confidential, Tenneco shall be barred from disclosing it. Tenneco shall have ten days from the date of Kern's submission to file its opposition, if any. The matter will stand submitted as of that time.

IT IS SO ORDERED.

DATED: 6 Sep. 85

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 81-3253 LEW (Gx)
CV 82-6875 LEW (Gx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant,

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Oct. 11, 1985]

ORDER RE TENNECO'S MOTION
FOR DISCLOSURE OF DOCUMENTS

On September 6, 1985, this Court issued an order directing Kern Oil & Refining Company and Tenneco Oil Company to file briefs addressing the issue of whether the documents Tenneco seeks to turn over to the Department of Energy contain confidential information. The

Court since then has received and read Kern's Second and Third Supplemental Memoranda and Tenneco's replies thereto. Having considered those papers and all exhibits thereto in addition to all prior briefing on this motion, this Court hereby finds:

That the protective order entered into by the parties and signed by this Court contemplated that all documents discovered in the course of this litigation be presumed confidential and be used only for the purposes of this litigation;

That the documents which Tenneco seeks to disclose are documents containing the type of confidential commercial information which the protective order sought to keep private;

That Tenneco's expressed reason for disclosing said documents is to present them to the Department of Energy for the purpose of causing that agency to review an earlier action and order thereon which order, Tenneco asserts, was the result of fraud perpetrated on DOE by Kern;

That Tenneco was not a party to the proceedings involving Kern before the DOE; and

That DOE is not a party to the suit now in issue before this Court;

While Kern has failed to demonstrate good cause why the disclosure of Exhibits B, D, G, E (apart from those documents listed in Exhibit B to Tenneco's Second Supplemental Memorandum) and F (as revised) should not be permitted, the procedure now suggested by Tenneco can only result in further delay and may further complicate and extend the present proceedings with no assurance that positive and constructive results will be achieved. The questions raised are better resolved within the scope of the present litigation and parties.

Therefore, IT IS HEREBY ORDERED that Tenneco's motion for disclosure of documents is DENIED.

IT IS SO ORDERED.

DATED: October 11, 1985

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE LAUGHLIN E. WATERS, Judge Presiding

No. CV 81-3253-LEW (Kx)
No. CV 82-6875-LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

vs.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counter-Claimant,

vs.

KERN OIL & REFINING CO.,
Counter-Defendant.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California

Wednesday, December 18, 1985

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Official Court Reporter
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[8B-3] Los Angeles, California;

Wednesday, December 18, 1985; 9:00 A.M.

* * * *

THE COURT: Please be seated.

I'm going to make a few comments, and then I'll give you the essence of my ruling. These comments that I'm going to make are not going to be definitive, nor are they going to be complete in all particulars. So I put that caveat in because on another occasion, I did make some comments when I ruled from the bench, and the briefs, then, came back saying that I hadn't discussed this, and I hadn't discussed that. Therefore, whatever arguments flowed from it. So I don't want anybody to get the impression that this short time that I'm going to take will address every question that's been raised.

The first comment is about the performance of counsel in this case, and I applaud you both, both sides, I guess, I should say here. It's not often that we have cases as vigorously and professionally and competently advocated on both sides as we've had here, and I think both sides at least are in agreement on the proposition that everything that can be briefed has been briefed, and thoroughly, and imaginatively, and creatively as well as with a high degree of professionalism. From my own part, I'm appreciative of that. By the same token, by the time I finish my remarks, [8B-4] both sides won't necessarily be appreciative of what I say, but we do have to come to a point of decision, and that's the purpose of this forum.

I commented at the outset of trial, that much of this case would be determined upon the credibility of witnesses, and I renew that observation. I do bear in mind, and it's understandable that the witnesses who have testified here, if they possess one thing that's common, it's a bias on behalf of their respective positions, and that's understood and that's acceptable. Over a period of time, why, the shadings of the bias become somewhat more marked, and I was impressed by that fact as I listened to each side call the people they desired to have testify.

Some witnesses, I think, testified partly from a lack of knowledge. Some of them testified given their respective

position with as much body English as they could, and I had trouble with the integrity and objectivity of some witnesses more so than others.

I will comment back in regard to the performance of the attorneys, again, that as has been pointed out here, some points were addressed by one side and not addressed by the other and vice versa. So we have the scene really of a war being fought, but the combatants are on somewhat different battlefields, and I have to try to bring this together and reach a decision on that which I think is [8B-5] appropriate in light of all of the circumstances.

As to the matter of the statute of limitations, it is my conclusion that the complaint was timely filed, that the arguments advanced by Kern in that regard are the arguments upon which I do rely. Now, there may be a different construction later on as this case proceeds, because clearly whatever happens in this court is not going to be the final step, but I think the complaint was timely filed.

As to the fundamental issues and what really happened in this case, it seems to me that the parties here started out in a companionable fashion and had entered into an agreement prior to the May 1977 agreement and had functioned effectively with each other for some period of time.

Tenneco, of course, was the producer, and Kern in part was the refiner, but, also a distributor of the oil that was produced by Tenneco. The relationship continued and became somewhat more intense during the oil glut that was referred to here, because it created problems both for Tenneco and Kern and raised the very real question as to the possible shutdown of the Yowlumne Field due to Kern's apparently expressed problem of not being able to absorb any more oil, again, in light of the glut situation.

The fortuitous event that took place, as I view it, [8B-6] was the sudden availability of the Four Cor-

ners pipeline and the reversal of the flow of the crude through that pipeline, which created the opportunity for Tenneco to suddenly provide assistance to its refinery at Chalmette. Now, Chalmette, of course, was in existence probably for some period of time prior to the existence of any agreement between these parties. Chalmette always had to be a prime concern for Tenneco, and it's very clear that this is an exceedingly complex and complicated industry, and the exchanges and interchanges that take place between all levels of the industry and the various companies, it's fast-moving, and it's detailed and extremely competitive.

Tenneco, as I view it, fastened upon this opportunity to ultimately provide additional crude for the operation of its refinery in Chalmette by taking advantage of the opportunity presented to the Four Corners pipeline. It was of necessity imposed upon Tenneco to work through Kern on that because of Kern's peculiar position in regard to the Texaco pipeline, and it was really at this point that the strain began to develop, and it was at this point, of course, that the July 1978 agreement came into place.

It is my view that the July 1978 agreement is not a true buy-sell agreement, but it was an agreement that was entered into by the parties by reason of the structure of California law as enforced by the Public Utilities [8B-7] Commission which compelled that. It was, in my view, nothing more or less than a transportation agreement.

The July 1978 agreement was later superseded by the February 1979 agreement. I do not believe that any significant rights of crude to either party as a result of the July 1978 agreement, nor do I believe that those rights, whatever they may have been, were in any way affected by the February 1979 agreement, which, as I understand the evidence, was simply a transaction or an agreement that simplified the bookkeeping between the parties.

I listened to Mr. LeDoux and his testimony as one of those individuals with which I have more trouble than some others. I have even more trouble with some of the testimony of Mr. Strader. Particularly do I have trouble with the testimony as it came out saying that Kern knew, Kern understood, these were our intentions, and we acted in accordance with a gentleman's agreement.

In an industry as big and as complicated as this, while there was attorney output or input on this matter, apparently this industry moved so rapidly that the attorneys are unable to keep up with what is actually taking place in the field, and for that reason, the document drafted in June, for example, was not signed until October, even though the parties have been acting under the compulsion of that agreement.

[8B-8] I have to look at the agreements that were prepared by Tenneco, and I do accept the argument that Tenneco knows how to draft agreements. The agreement of May 19, 1977—and I'm looking now at Exhibit A—"Crude oil from the above leases will be balanced against crude oil sold to Tenneco by Kern County Refinery up to 3,000 barrels a day."

Now, that langauge is clear, and it's unambiguous. The balancing obligation was up to that 3,000-barrel limit.

There were other agreements that were prepared by Tenneco with other parties where the language was equally clear and equally unambiguous where it said that the agreement was entered into, and it will be balanced barrel for barrel, and that was consistent with Tenneco's desire to provide additional crude for its refinery at Chalmette. But I don't believe that the May 1977 agreement entered into between these parties contemplated that, nor did it come within the contemplation of the Tenneco executives until after the Four Corners pipeline became available to them.

In regard to Kern's right to all crude from the Yowlumne Field, I think they've made a sufficient showing to establish that they have that right, including the oil from Sections 33 and 34.

Now, we've had some eloquent argument about how certain accounting procedures have taken place in regard [8B-9] particularly to make sure that those people who have a royalty interest in a particular well are properly compensated, but I think that's really aside from the point that oil from Sections 33 and 34 was comingled with other oil in Tank Farm 4, and it's my conclusion that Kern received oil from Sections 33 and 34, and while it seems to be kind of an interesting thread upon which to hang the conclusion that certain supplier-purchaser relationships flowed from that on the basis of first use, I think that is where this case goes.

So as I view it, Kern has made a sufficient showing, carried its burden, to demonstrate that they did have an agreement, that the agreement was breached by Tenneco, and Tenneco breached it because of its perceived needs for its tank farm in Chalmette, that Kern was entitled to the protections of the supplier-purchaser provisions of the appropriate regulations, and that there has been a sufficient showing of damage to Kern so that the Court must find judgment for Kern in regard to the liability phase.

Now, there has been a substantial amount of argument in regard to whether or not Kern was, in fact, damaged. That's something we're going to have to address later on. I reached no view on that at this time. I'm sure it will be an equally complicated and sophisticated presentation by both sides. I'm sure that both sides feel [8B-10] that I'm failing to address a number of very important points that you have raised, but I don't see the relationship as being really that much more complicated than I voiced here, which I suppose will buttress you in your conclusions that my approach is perhaps too simplistic.

In any event, while oil companies do have agreements and so on, I think they're all essentially very vigorous competitors with each other, and when the occasion arises, why, it's a kind of a no-quarter situation. I suspect that's what's happened here.

* * * *

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Aug. 28, 1986]

MEMORANDUM OF DECISION

These consolidated cases raise issues of breach of contract and breach of regulatory obligations by Tenneco Oil Company ("Tenneco") against Kern Oil & Refining Co. ("Kern") and damages flowing therefrom. The liability phase has been previously tried and resulted in a finding adverse to Tenneco. Specifically, the Court found that Tenneco had breached the regulatory obligations as

pleaded in count one and had breached the contract as pleaded in counts two through seven. The Court will now address the remaining issues concerning damages and whether attorneys' fees and related costs should be awarded to Kern.

In urging its view as to the proper quantum of damages, Kern changed position several times during the progress of the litigation, on each occasion asserting a greater amount due. The amounts finally settled upon by Kern, during trial of the damage phase, were not less than $16,761,639.00 as lost profits plus prejudgment interest of $12,836,980.00 on its breach of contract claim or, alternatively, $15,180,303.00 as prejudgment interest on its breach of regulatory obligation claim plus attorneys' fees and related costs incurred in prosecuting its claims for a total amount in excess of $30,000,000.00.

During the trial on the damage phase, Tenneco pleaded surprise concerning the latest projections as to the amount of damages advanced by Kern and insisted on an interruption of the trial so that it could more fully consider this latest contention and more effectively cross examine the Kern witnesses. Tenneco's request for delay was granted. Interestingly, when trial resumed, Tenneco left this area of examination virtually untouched, thus raising the inference that the requested delay was for a purpose or purposes other than those expressed to the Court.

While not addressing Kern's last damage computation directly, Tenneco raised several arguments which, if sustained, would tend to reduce the total of damages claimed. In so doing, Tenneco was in effect seeking to retry the liability phase of the trial. These arguments included the following assertions: that Kern did not have the capacity to process all of the crude available from the Yowlumne field and that, as a result, Kern did not experience a shortage of crude; that Kern's refinery was so designed

so that it could not process the high gravity crude available from the Yowlumne field without massive and very expensive redesign of Kern's refinery; that Kern would have sold excess Yowlumne crude rather than process it if available; that Kern would have incurred entitlement obligations on contract crude processed between April 1, 1979 to March 31, 1980; that Kern failed to make commercially reasonable efforts to mitigate its damages; and that damage to Kern was not reasonably foreseeable by Tenneco.

Discussion

The points addressed in this memorandum do not purport to be an exhaustive discussion of all of the issues raised during the trial, but they will be discussed for the purpose of indicating the bases of the Court's decision. Much of Tenneco's case was based on a highly selective approach of specific instances from which a general conclusion is urged. Upon analysis, however, and in light of more persuasive countervailing evidence, this selective evidence did not sustain the positions asserted by Tenneco. This had the effect of eroding the credibility of a number of the Tenneco witnesses and weakening and/or destroying the validity of their contentions. Such selective argumentation left the Court wondering, on occasion, as to what the true facts were.

As a case in point, in its challenge to the capacity of the Kern refinery to process Yowlumne crude at the rate of 21,000 BPSD (barrels per stream day), Tenneco relied heavily upon the figures showing reduced production during the start-up period of the refinery and the period of reduced production during a strike in 1980. Tenneco thus concluded that Kern did not have capacity to process the Yowlumne crude in amounts greater than 16,000 BPSD. Kern effectively rebutted this contention by more credible witnesses and through more persuasive documentation. The Court concludes that the limit on the

BPSD capacity was largely due to the failure of Tenneco to supply contracted crude from the Yowlumne field. The Court also finds that the Kern refinery had a capacity of 21,000 BPSD.

Tenneco urges that due to the design of the Kern refinery, it did not have the ability to process or to handle the higher gravity crude from the Yowlumne field. Mr. Tucker, testifying on behalf of Tenneco, attempted to correlate Kern's crude unit processing rate with API crude gravity and produced a graph to demonstrate his conclusion. The Court finds that the points on the graph adapted by Mr. Tucker were not the most valid points, that the line, therefore, was distorted and that the conclusion urged was misleading.

It is true, of course, that the Kern refinery was processing lower gravity crude, but this was due to the non-availability of Yowlumne crude. Kern testified, and the Court finds, contrary to the contentions of Tenneco, that the modifications of the Kern refinery necessary to process higher gravity crude were not significant in cost and could be readily achieved without major modification of the refinery. Had the Yowlumne crude been made available to Kern, sound business practice dictates that it would have been processed by Kern and not sold, so that higher quality products would have been produced in Kern's inventory.

As to the question of foreseeability on the part of Tenneco of damage to Kern, even if relevant, the Court finds that the damage was foreseeable. Tenneco operates its own refinery at Chalmette, Louisiana and thus knows of the importance of crude, both in volume and quality, to a refinery. Indeed, it was Tenneco's desire to protect its own interest in its refinery which resulted in the breach of contract with Kern.

The oil industry is highly competitive and industrial intelligence between competitors is vigorously pursued.

The manner in which Tenneco effected the diversion of Yowlumne crude from Kern and its awareness that the diversion would require "rather delicate handling" is indicative of knowledge on the part of Tenneco. "It is not necessary that the *specific* injury or *amount* of harm be foreseen, but only that a reasonable person in [defendant's] position would foresee that in the usual course of events, damages would follow from its breach." *Barnard v. Compugraphic Corp.*, 667 P.2d 117, 120 (Wash. App. 1983) (emphasis in original).

As to the argument regarding entitlement obligations, Kern has made a sufficient showing that its conduct was not violative of federal regulations and that the Department of Energy made an audit of entitlements compliance from October 1980 through January 1981 and found Kern to be in compliance.

The fact that retroactive exception was granted to Kern by the Department of Energy for the period October 1979 to March 1980 does not invalidate or modify Kern's claim for damages. Such relief was granted after due consideration by the Department of Energy, and Kern is entitled to rely upon it. Tenneco cannot now make a collateral attack on an order to which it was not a party. It must take the order as it finds it. *See Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512 (1953). Tenneco conceded, under cross-examination, that if Kern's entitlement purchase obligations would not exceed the amount of its exception relief eligibility, Kern's damage claim would not be affected.

Damages

In light of the above, Kern is entitled to damages for lost refinery profits in the amount of $16,761,639.00.

Attorneys' Fees

Kern also seeks attorneys' fees under the authority of Section 38 of the Texas Civil Procedure & Remedies Code.

Failure to award attorneys' fees in this case would unfairly disadvantage Kern to the betterment of Tenneco which deliberately embarked on this program of contract and regulatory breach. To hold otherwise would permit Tenneco to profit from its own wrongdoing.

The Court finds that Kern has complied with the requirements of the pertinent Texas statutes and that it is entitled to attorneys' fees plus related costs including attorney's fees and costs for post trial motions.

Interest

Interest is sought under the authority of *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985) for breach of contract. In *Crown Central Petroleum Corp. v. National Union Fire Ins. Co.*, 768 F.2d 632 (5th Cir. 1985), the court stated ". . . that . . . Cavnar . . . must be read to create a judicial scheme for the award of prejudgment interest in all cases." *Id.* at 637. Under this authority, Kern is entitled to prejudgment interest in the amount of $12,836,980.00 plus additional interest computed at the rate of 10% to the date of this decision plus post judgment interest at the rate of 10% until judgment is paid, all interest to be compounded.

Kern also urges interest on the alternative basis in the amount of $15,180,303.00 on the breach of regulation claim. This interest is computed on the basis of the Department of Energy's use of the prime rate or by the provisions of 28 U.S.C. 1961 (the federal post judgment interest statute). In the circumstances of this case and in the appropriate exercise of discretion and consistent with the determination made in *Kern Oil & Refining Co. v. Tenneco Oil Co.*, Case No. 81-0791-R, interest is awarded to Kern on this alternative basis in the amount of $15,180,303.00 plus such additional interest as may accrue until date of payment of the award herein based on T-bill investment rates in effect from time to time.

Conclusion

As earlier indicated, these comments are not intended to be exhaustive of all issues raised by the parties hereto, but are designed to summarize some of the bases for the Court's decision.

Counsel for Kern are directed to prepare findings of fact and conclusions of law on all material issues involved and are further directed to prepare a judgment in accordance with this memorandum of decision.

DATED: 28 Aug. 86

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
Sr. District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counterclaimant,

v.

KERN OIL & REFINING CO.,
Counterdefendant.

[Filed Sept. 25, 1986]

ORDER RE TENNECO OIL COMPANY'S MOTION FOR DISCLOSURE OF TRIAL TRANSCRIPTS AND EXHIBITS

On October 11, 1985, this Court issued an order denying Tenneco's motion for disclosure of documents obtained through discovery. On Kern's motion, and without objection from Tenneco, the Court during trial of the damages phase of this action extended the protective order filed on

January 31, 1984 to cover the trial transcript and trial exhibits. Thereafter, the documents which Tenneco sought to have disclosed prior to trial were admitted into evidence. Some six months after the conclusion of trial, but prior to entry of final judgment, Tenneco moved to vacate the order of this Court sealing the trial record. At the hearing on the motion, held on August 4, 1986, the Court took the matter under submission. Having considered the briefs filed by the parties as well as the oral argument of counsel, the Court for the reasons set forth below now grants Tenneco's motion.

Tenneco argues that it has both a First Amendment and a common law right of access to the documents at issue. Although three Circuits have found that the First Amendment does confer a right of access to the records of a civil case, *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-1179 (6th Cir. 1983); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1067-1070 (3rd Cir. 1984); *In Re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-1309 (7th Cir. 1984); *but see In Re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1330-1341 (D.C.Cir. 1984) (First Amendment right of access, if any, does not accrue until after entry of final judgment), this issue has not been addressed by either the Ninth Circuit or the Supreme Court. The common law right of access claimed by Tenneco is however universally recognized. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-600, 98 S.Ct. 1311-1313 (1978) and *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1066 (3rd Cir. 1984).

The traditional common law right of access cannot be given straightforward application in this case because it is being asserted by a party to the litigation which already has access to the documents at issue. What Tenneco seeks by its motion is not access to the documents, but rather vacation of an order which prohibits dissemi-

nation of the documents. Tenneco has failed to cite a case which establishes a common law right to disseminate documents which are the subject of a protective order.

Although the Court finds that Tenneco's common law right of access has not been violated, it is not necessary to reach the constitutional claims raised by Tenneco because Tenneco is entitled to relief on other non-constitutional grounds. Given the present posture of this case, the Court now finds that there is no good reason to continue to extend the protective order to cover the trial transcripts and trial exhibits. Because this matter has now been tried, presentation by Tenneco of the documents at issue to the DOE will not delay proceedings before this Court. Moreover, when ruling on Tenneco's original motion for disclosure, this Court found that Kern had failed to demonstrate good cause as to why the documents should remain under seal. The Court now reaffirms this finding. The documents at issue relate to certain spot transactions entered into by Kern with suppliers and exchange partners more than five years ago. Kern's argument that this information can be used to Kern's detriment by its competitors is unpersuasive, especially in light of Kern's recent concession that all other information contained in the trial record is not confidential. Kern's Memorandum of Points and Authorities in Opposition to Tenneco's Motion for Disclosure of Trial Transcripts and Exhibits at p. 8; *see In Re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C.Cir. 1985). There being no good cause for the maintenance of the protective orders, those orders are vacated insofar as they pertain to trial exhibits received into evidence and to the trial transcript. *Tavoulares v. Washington Post Co.*, 737 F.2d 1170, 1172-1173 (D.C.Cir. 1984). However, in order to allow Kern an opportunity to seek review of today's ruling by the Ninth Circuit, this order is not to become operative until October 3, 1986.

Until that time, Tenneco remains bound by the previously entered protective orders.

IT IS SO ORDERED.

Dated: September 25, 1986

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
Sr. United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. 81-3253 LEW (Kx) &
82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant,

TENNECO OIL COMPANY,
Counter-Claimant,

v.

KERN OIL & REFINING CO.,
Counter-Defendant.

[Entered Nov. 5, 1986]

ORDER AND JUDGMENT

This action having come on regularly for trial commencing December 3, 1985, the Honorable Laughlin E. Waters, Judge, presiding, and the claims presented to the Court having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Judgment is granted in favor of plaintiff Kern Oil & Refining Co. on the First, Second, Third, Fourth, Fifth,

Sixth and Seventh Clauses of Action of the Consolidated Amended Complaint.

(a) Plaintiff is to recover damages from defendant Tenneco Oil Company in the sum of $16,751,639.00.

(b) Pursuant to Texas law, plaintiff is to recover $———— from defendant for attorneys' fees and costs incurred by plaintiff in prosecuting its breach of contract claims, plus those attorneys' fees and costs it incurred in connection with its regulatory, misrepresentation and fraud claims and its defenses against defendant's counterclaims, to the extent those legal services and costs cannot be distinguished from legal services rendered and costs incurred in prosecution of the breach of contract claims.

(c) Pursuant to Texas law and Fed. R. Civ. P. 11, plaintiff is to recover $———— from defendant for attorneys' fees and costs incurred in resisting defendant's post-trial motions heard on August 4, 1986.

(d) Plaintiff is directed to move pursuant to Local Rule 16.10 for a hearing to determine the amount of attorneys' fees and costs to be awarded under (b) and (c) above, and upon such determination, those amounts shall form part of this judgment.

(e) Plaintiff is to recover from defendant pre-judgment interest in the amount of $15,180,303.00, plus additional prejudgment interest in the amount of $————, as is accrued on the amount described in (a) above from January 15, 1986 until date of this judgment, computed in accordance with 28 U.S.C. § 1961.

(f) Pursuant to Fed. R. Civ. P. 54(d), plaintiff is to recover $———— for its costs of action from defendant.

(g) Plaintiff is to recover postjudgment interest as is accrued on the amounts described in ¶ 1(a), (b), (c), (e) and (f) above and ¶ 2(c) below from the date of this judgment until payment, computed in accordance with 28 U.S.C. § 1961.

2. Judgment is granted in favor of counter-defendant Kern Oil & Refining Co. on the Fourth Counterclaim.

(a) Counter-claimant Tenneco Oil Company is to take nothing on the Fourth Counterclaim.

(b) The Fourth Counterclaim is hereby dismissed on the merits.

(c) Pursuant to Fed. R. Civ. P. 54(d), counter-defendant is to recover $———— for its costs of action from counterclaimant.

3. Judgment has heretofore been entered in favor of counter-defendant on all other Counterclaims, and counter-claimant is to take nothing on any counterclaim in this consolidated action.

4. There is no just reason for delay in allowing this Judgment to be appealed, and the Clerk of this Court is hereby directed, pursuant to Fed. R. Civ. Proc. 54(b), to enter final judgment forthwith as to the claims referred to herein in accordance with the terms hereof.

DATED: 10 Oct., 1986

/s/ Laughlin E. Waters
THE HONORABLE LAUGHLIN E. WATERS
United States District Court Judge

Submitted September 5, 1986 by:

RICHARD E. SHERWOOD
SUZANNE F. DUFF
VERA P. PARDEE
O'MELVENY & MYERS

/s/ Suzanne F. Duff
SUZANNE F. DUFF

Attorneys for Plaintiff
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Kern Oil & Refining Co.

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. 81-3253 LEW (Kx) &
82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

TENNECO OIL COMPANY,
Counter-Claimant,

v.

KERN OIL & REFINING CO.,
Counter-Defendant.

[Filed Nov. 21, 1986]

FILED UNDER SEAL PURSUANT
TO PROTECTIVE ORDER OF THE COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL

This matter having come on for bench trial commencing December 3, 1985, the Honorable Laughlin E.

Waters presiding, and the Court having considered the Memoranda of Contentions of Fact and Law, the Pre-Trial Conference Order, the Amendment to Pre-Trial Conference Order, the Trial and Post Trial Briefs, the testimony, exhibits and argument presented at trial, and the papers and arguments presented in connection with Tenneco's post-trial motions to dismiss Kern's causes of action,

THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. FINDINGS OF FACT

1. To the extent these Findings of Fact are deemed Conclusions of Law, they are incorporated into the Conclusions of Law that follow.

2. All stipulations of material fact contained in Paragraph 5 of the Pre-Trial Conference Order and the Amendment to Pre-Trial Conference Order are incorporated herein. All stipulations of fact in Paragraph 5 of the February 29, 1984 Pre-Trial Conference Order in Case No. CV 81-0791, Ex. 263, that are relevant to this litigation are incorporated herein. All Findings of Fact in the July 27, 1984 Findings of Fact and Conclusions of Law After Trial in Case No. CV 81-0791, Ex. 264, that are relevant to this litigation are incorporated herein.

3. Myriad factual disputes were aired during the course of trial herein. The resolution of these disputes turns on the credibility of witnesses. Tenneco's case was based on a highly selective approach of specific instances from which a general conclusion was urged. Kern presented more persuasive countervailing evidence. Tenneco's selective evidence did not sustain the positions it asserted, and the credibility of a number of Tenneco witnesses was eroded.

4. Kern is a small "independent" crude oil refiner whose only refinery is located in Bakersfield, California.

Because Kern has no crude production of its own, it must acquire from others all crude to be run in its refinery. Kern's profitability depends on the continuous availability of sufficient volumes of "light" crude to enable Kern to produce high value products and to run its refinery at optimal capacity. Kern frequently engages in sales (including reciprocal sales) and exchanges of crude in order to reduce transportation costs and obtain the most profitable supply of crude for its refinery.

5. Tenneco is a larger "integrated" oil company with substantial crude production in California and elsewhere, a refinery in Chalmette, Louisiana, and marketing facilities in various parts of the country.

6. Tenneco first sold crude from its Yowlumne, California field to Kern in 1975 pursuant to an October 1975 Tenneco-drafted contract, Ex. 1. As additional Yowlumne properties came into production after 1975, Tenneco sold the bulk of that crude to Kern. In June 1976 the parties executed a second Tenneco-drafted contract, Ex. 2, formally committing Tenneco to sell Kern all crude from the Tenneco properties from which Kern was by then purchasing crude. Thereafter, as additional Yowlumne properties came into production, Tenneco again sold that new production to Kern. In May 1977 the parties entered into a new contract, Ex. 6, again drafted by Tenneco, replacing their earlier contracts and formally committing Tenneco to sell Kern all crude produced from the properties listed in Exhibit A to that contract (which included all Tenneco properties from which Kern was by then purchasing crude). The May 1977 contract contained no specific termination date; it was terminable by either party on 90 days notice. Tenneco did not terminate that contract until August 1980, effective November 30, 1980.

7. At or about the time of entering into the May 1977 contract, Kern and Tenneco orally agreed that Tenneco would sell to Kern, under the terms of the May 1977 con-

tract, crude from all Yowlumne properties coming into production after May 1977. Subsequent Tenneco invoices to Kern for such Yowlumne crude production identified it as being sold pursuant to the May 1977 contract.

8. At no time did Kern represent to Tenneco that Kern would refrain from asserting a regulatory "supplier/purchaser" claim against Tenneco under 10 C.F.R. 211.63. Tenneco could have drafted a clause in the May 1977 contract attempting to waive its regulatory supply obligations, such as appears in contemporaneous contracts between Tenneco and others, *e.g.*, Exs. 19, 26, but Tenneco did not do so, and no waiver exists in the contract or elsewhere.

9. In entering into the May 1977 contract, Tenneco and Kern agreed and understood that all of Tenneco's sales to Kern beyond 3,000 barrels per day were to be outright sales, and the May 1977 contract so states clearly and unambiguously. Moreover, because the parties specifically agreed in the contract to "balance" Tenneco's sales only up to 3,000 barrels per day and because other Tenneco contracts with third parties specifically provided for balancing when it was so intended, it is clear that Kern and Tenneco did not contemplate balancing Tenneco's sales to Kern beyond 3,000 barrels per day. Nor did Tenneco and Kern intend that Tenneco's unmatched sales over 3,000 barrels per day would be temporary, or that they would be conditional in any respect, or that Kern would merely be Tenneco's marketing agent for crude in excess of 3,000 barrels per day.

10. Beginning in approximately Spring 1978, a long-standing scarcity of crude in California changed into temporary oversupply. At the same time, Tenneco's Yowlumne production increased substantially, to a point at which it exceeded Kern's refinery needs. Tenneco relied almost completely on Kern to absorb Tenneco's Yowlumne production so as to avoid "shutting in" the Yowlumne field.

11. In Spring 1978 Tenneco learned that the Four Corners Pipe Line ("FCPL") would become operational in June 1978 for movement of crude eastward, thus providing the first opportunity physically to transport Yowlumne crude from California to east of the Rockies, from where it could readily be traded for crude supply for Tenneco's Chalmette, Louisiana refinery. Tenneco wanted to keep for itself the Yowlumne crude that it had agreed to sell to Kern. Kern, at that time, did not need all the Tenneco Yowlumne crude for Kern's refinery.

12. Tenneco did not suggest to Kern that the May 1977 contract be amended or terminated so as to reduce or eliminate Tenneco's sales of Yowlumne crude to Kern: Tenneco knew that Kern would not have given up its rights to the crude, and Tenneco needed Kern's cooperation to move the crude out of the Yowlumne field. The Yowlumne crude could be moved from the field to the FCPL only through a pipeline owned by Texaco. Kern had contractual rights to move crude through the Texaco pipeline pursuant to a transportation service agreement between Kern and Texaco, but Tenneco did not. Under the terms of the agreement, Tenneco crude could be transported through the Texaco pipeline only if title was transferred from Tenneco to Kern to Texaco (and then back from Texaco to Kern to Tenneco at the end of the pipeline).

13. Instead of revealing its true intent to reduce and eventually eliminate Yowlumne crude sales to Kern, Tenneco suggested that they enter into an agreement whereby Kern would move approximately 4,500 barrels per day of Tenneco's surplus Yowlumne crude (*i.e.*, crude not needed for Kern's refinery) for Tenneco from the field to the FCPL. Tenneco drafted this July 1978 agreement, Ex. 14, structuring it as a "sale" from Kern to Tenneco at the end of the Texaco pipeline. (Tenneco was already giving Kern title to the crude at the beginning of the pipeline under the May 1977 contract). With the

initial passing of title from Tenneco to Kern under the May 1977 contract, then the Kern-Texaco-Kern pipeline transfers of title, and then the passing of title back to Tenneco under the July 1978 agreement, Tenneco was able to transport its own crude back to itself at a point where it could move that crude through the FCPL and then trade it for supply at Tenneco's Louisiana refinery. The price Tenneco paid Kern at the end of the Texaco pipeline was precisely the same as the price Kern had paid Tenneco at the beginning of that pipeline plus Kern's gathering and transportation costs. The July 1978 agreement was a transportation service arrangement, not a bona fide sale from Kern to Tenneco.

14. At the time of entering into the July 1978 agreement, Tenneco assured Kern that Tenneco would not leave Kern without a sufficient refinery supply, and, based on Tenneco's assurances, Kern understood that the transportation arrangement would be limited to surplus Yowlumne crude Kern could not use. Tenneco's objective was eventually to take all of the Yowlumne production for itself, but it concealed that intent from Kern. Tenneco deliberately embarked on a program of contractual and regulatory breach to protect its own interests at the expense of Kern.

15. Tenneco induced Kern to enter into the July 1978 agreement by falsely representing to Kern that Tenneco would continue supplying Kern with sufficient Yowlumne crude to meet Kern's refinery needs. Tenneco acted in bad faith toward Kern, capitalizing upon the circumstances of the crude oil glut and the opening of the Four Corners Pipeline for its own purposes, in intentional derogation of Kern's rights.

16. At all relevant times, Tenneco was fully aware of Kern's refinery expansion plans and its dependency on Yowlumne crude for refinery supply. Despite this knowledge, Tenneco took for itself increasing amounts of the

Yowlumne crude it should have sold to Kern and made numerous direct sales of that crude to third parties. Over the course of Fall 1978, as Tenneco diverted more and more Yowlumne crude from Kern, Kern became concerned about its refinery supply and complained to Tenneco.

17. Although Kern did not sign the July 1978 agreement until October 1978, after the point when Kern began to become concerned about its refinery supply, execution of the contract was, in Kern's eyes, a required formality reflecting an agreement it had entered into months earlier. Kern's acquiescence in the July 1978 agreement was not intended to and did not waive any of Kern's rights to quantities of Yowlumne crude sufficient for Kern's refinery.

18. In early January 1979, at Kern's request, a meeting was held with Tenneco in which Kern insisted on its rights to the Yowlumne crude. Tenneco stated at the meeting that it would look into the matter and did not then, or earlier, definitively refuse to honor its supply obligations. Only in mid-January 1979 did it become clear to Kern that Tenneco did not intend to supply Kern's refinery needs.

19. In early February 1979 Kern filed a complaint with the United States Department of Energy ("DOE"), Ex. 71, alleging that Tenneco had violated the supplier/purchaser regulations. The DOE subsequently began remedial proceedings against Tenneco and, on May 24, 1979, ordered Tenneco to sell 7,000 barrels per day of crude to Kern. That order was rescinded on technical grounds on November 6, 1979, but the DOE remedial proceeding continued until mid-1981, when it was terminated by consent order between Tenneco and the DOE.

20. Tenneco sold Kern 7,000 barrels per day from May 24, 1979 through mid-January 1980, not in reliance on any representations by Kern to the DOE, but because

it was compelled to do so by the DOE order. Tenneco suffered no detriment from these sales because they reduced its liability to Kern in this lawsuit.

21. In February 1979 Tenneco and Kern replaced the July 1978 agreement with another transportation service agreement, Ex. 46, again drafted by Tenneco, this time cast as a straightforward exchange, not a "sale," of crude, but fulfilling the same function and serving the same purpose as the July 1978 agreement. By that time, both parties were aware of each other's position, and they intended that no significant rights of either party were to be affected by the February 1979 agreement. Kern's acquiescence in the February 1979 agreement was not intended to and did not waive any of Kern's claims against Tenneco. Kern protested Tenneco's continuing breach of supply obligations at the inception and during the entire lifespan of the February 1979 agreement. The February 1979 agreement remained in effect until 1981.

22. Between May 1977 and November 1980, Tenneco sold Kern some, but not all, crude from the Yowlumne properties identified in Exhibit A to the May 1977 contract. It also sold Kern some, but not all, crude from Yowlumne properties not listed in Exhibit A (Bennett, Bradford, Unit A, and Sections 4, 4A and 5), and Tenneco's invoices to Kern for that crude stated that it was sold "per contract of May 19, 1977."

23. The properties included in "Section 33" and "Section 34" (Westland Unit, Wishon Unit, Louden, Russell, Newmark, McMahon, Scott-Smith Unit, Johnson Unit, Coretto Estate, and Hooker) are part of the Yowlumne field. Tenneco commingled crude from Sections 33 and 34 in tanks with crude from other properties and sold Kern some of that commingled crude, but did not identify any of it as coming from Section 33 or 34; rather, Tenneco identified it on invoices to Kern as crude from other Yowlumne properties. As a result, Kern was unaware that Tenneco was in fact selling Kern any crude from Section

33 or 34, and that it had thereby acquired regulatory rights to Section 33 or 34 crude. Therefore, Kern could not and did not waive its rights to Section 33 or 34 crude oil.

24. Tenneco was obligated to sell Kern the crude produced from Sections 33 and 34, Section 10, Texaco Section 14 and Texaco Section 15A. That crude bore the DOE classification of "newly discovered" crude because those properties were not in production prior to 1979. There were no entitlement costs associated with refining that crude because of the DOE classification.

25. Although Tenneco continued to sell Kern some crude, Tenneco withheld substantial amounts of Yowlumne crude from Kern over the course of 1978, 1979 and 1980. But Tenneco's conduct did not damage Kern until April 1979, when Kern's refinery expansion was completed.

26. From April 1979 through November 1980, Kern experienced a crude shortage directly attributable to Tenneco. Kern purchased other crudes as replacement for some lost Tenneco Yowlumne, but was unable to obtain (a) enough equivalent quality crude at a cost comparable to the contract price or (b) sufficient volumes of crude. Kern's attempts at mitigation caused it further loss in four months of the damage period, but Kern acted reasonably in its purchases of mitigation crude to replace the Yowlumne crude Tenneco did not deliver.

27. While Kern's refinery processed lower gravity crude during the relevant time period, this was due to the non-availability of the Tenneco Yowlumne crude, not to any physical limitations of the refinery. Any modifications necessary to process higher gravity crude could have been readily achieved without major modification or significant cost. Kern's refinery had a capacity of 21,000 BPSD and could have processed a "mix" of crude oil averaging an API gravity at least as high as 28 at the

capacity levels set forth in Kern's damage calculation. Ex. 19. The opposing evidence presented by Tenneco on this issue was not credible. For example, a graph adopted by Tenneco's expert witness, Ex. 2057, did not utilize the most valid points; thus the line on the graph was distorted and the conclusion urged was misleading. Kern's refinery could have processed the nondelivered 32 API gravity Yowlumne crude (mixed with lower gravity crudes) during the period April 1979 through November 1980. Kern's processing of the mix including the nondelivered Yowlumne would not have been limited by any physical characteristics of its refinery or by the 1980 refinery strike.

28. Kern would have processed, not sold, 1,872,314 barrels of the non-delivered Yowlumne crude from April 1979 through November 1980. It would have been sound business practice to do so. Kern had exception relief from the DOE entitlements program for the entirety of its fiscal year 1980 (April 1979 through March 1980). Accordingly, during that time, it could have and would have processed the Yowlumne crude without incurring entitlements obligations on that crude. From April 1980 through November 1980, Kern did not have exception relief and would have incurred entitlements cost on that portion of the Yowlumne crude that remained price controlled. Even without exception relief, the Yowlumne crude would have been more profitable for Kern to refine than the replacement crude it was able to purchase because (a) the Yowlumne crude, being lighter, produced more valuable products and Kern could have, and would have, produced refined products in the proportions assumed in Kern's damage calculation, and (b) the Yowlumne crude would have been priced at the contract—not uncontrolled—price; if Tenneco had billed Kern at the uncontrolled price for that crude, Kern would have paid it, by mistake, but would have been entitled to recover the overcharges because the May 1977 contract required the Yowlumne sales to be at the controlled upper tier

price. Findings of Fact and Conclusions of Law After Trial, Case No. CV 81-0791, Exhibit 264.

29. In 1981 the DOE conducted an entitlements compliance audit of Kern's crude purchase, sale, and exchange transactions, a review that included all the transactions from October 1980 through January 1981 which Tenneco now claims were illegal. The DOE was plainly satisfied from its audit that Kern was in compliance with the regulations.

30. From April 1979 through November 1980, the period of Kern's damage claim, Kern could have profitably refined 1,872,314 barrels of the Yowlumne crude that Tenneco failed to deliver to Kern. Kern lost profits of $16,761,639 between April 1, 1979 and November 30, 1980, directly attributable to Tenneco's conduct.

31. Every element of Kern's damage claim is supported by testimony and documents in the record. Kern's claim is neither speculative nor uncertain. Although Kern's damage calculation and the manner of that calculation have changed in some respects since Kern's initial damage claim, the result of such changes is a more accurate reflection of the actual damage caused to Kern by Tenneco. Kern's last changes occurred during the course of the trial, and when Tenneco pleaded surprise and insisted on an interruption of the trial so it could more fully consider Kern's latest contention and more effectively cross-examine the Kern witnesses, this Court granted the request for delay. When trial resumed, Tenneco left this area of examination virtually untouched. The Court infers that the requested delay was for a purpose or purposes other than those expressed to the Court. Tenneco never directly addressed Kern's last damage computation.

32. The DOE granted Kern exception relief from entitlement obligations during the entirety of Kern's fiscal year 1980. Even if Kern were liable for additional en-

titlements purchase obligations due to other crude transactions (not involving Tenneco), there would be no effect on Kern's damage claim because the amount of exception relief for which Kern was eligible during fiscal 1980 was large enough to cover the obligations associated with the Yowlumne crude and all other crude refined by Kern.

33. Tenneco could reasonably have foreseen that its failure to supply Yowlumne crude to Kern would damage Kern. Tenneco, itself a refiner, knows of the importance of crude, both in volume and quality, to a refinery. Tenneco freely and knowingly drafted and entered into the May 1977 contract giving Kern rights to all the rapidly increasing Yowlumne production and therefore could reasonably foresee that Kern might rely on its rights to that supply of crude to increase its refinery capacity. The manner in which Tenneco effected the diversion of Yowlumne crude from Kern and its awareness that the diversion would require "delicate handling," Ex. 106, are indicative of such knowledge on the part of Tenneco. Tenneco was also aware that Kern had received exception relief in the past, and Tenneco was itself involved in and fully cognizant of the entitlements program. Therefore it could have foreseen that Kern might be eligible for exception relief enabling Kern to process portions of the Yowlumne crude without paying entitlements costs.

34. Kern was denied the opportunity to invest or earn interest on its lost profits between April 1979 and the present time, a period of high inflation.

35. On October 22, 1985 Kern made written demand upon Tenneco for payment of its contractual claim. Tenneco did not satisfy that claim.

36. On June 25, 1981 Kern received a copy of a letter dated June 22, 1981, in which the DOE's special counsel urged termination of all remedial administrative proceedings against Tenneco in light of a consent order between Tenneco and the DOE, and suggested that Kern seek

judicial relief. Six days later, on July 1, 1981, Kern filed its complaint in federal court based on the supplier/purchaser regulations, No. CV 81-3253. Kern filed its breach of contract claim, No. CV 82-6875, on December 28, 1982, and a consolidated amended complaint including causes of action for fraud and misrepresentation on September 30, 1983. Each of Kern's causes of action in the present consolidated litigation arises out of the same conduct, transactions and occurrences.

37. Trial here was bifurcated, with liability issues being tried in December 1985 and damage issues being tried in January 1986. The Court found for Kern on liability before proceeding to the damages phase. The arguments raised by Tenneco during the trial on damages effectively sought to retry the liability phase of the trial.

B. CONCLUSIONS OF LAW.

1. To the extent these Conclusions of Law are deemed Findings of Fact, they are incorporated into the preceding Findings of Fact.

2. All Conclusions of Law in the July 27, 1984 Findings of Fact and Conclusions of Law in Case No. CV 81-0791 that are relevant to this litigation are incorporated herein.

Breach of Regulations

3. The Mandatory Petroleum Allocation Regulations, 10 C.F.R. Part 211, and the Emergency Petroleum Allocation Act of 1973 on which the regulations are based, are not unconstitutional. *United States v. Exxon Corp.*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 106 S. Ct. 892 (1986); *Exxon Corp. v. United States Department of Energy*, 744 F.2d 98 (TECA), *cert. denied*, 105 S. Ct. 576 (1984); *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (TECA), *cert. denied*, 105 S. Ct. 1973 (1984).

4. Tenneco's sales of Yowlumne crude to Kern pursuant to the October 1975 contract and Tenneco's sales of

other Yowlumne crude to Kern after January 1, 1976, including sales of crude from Sections 33 and 34, established a regulatory supply obligation in Tenneco to sell all crude from those Yowlumne properties to Kern. 10 C.F.R. § 211.63.

5. Kern did not waive its regulatory supplier/purchaser rights at the time of entering into the May 1977 contract or at any other time. A small independent refiner cannot waive in advance its right to continued crude oil supplies unless it does so in writing and unless the parties agree to a specific termination date. 10 C.F.R. § 211.63(d); *Arizona Fuels Corporation*, 6 Energy Mgmt. (CCH) ¶ 56,472 (August 13, 1979); *Giant Industries, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,535 (January 6, 1981). Neither of these conditions occurred here.

6. The July 1978 agreement was a transportation service agreement in which Kern, "incident to providing a service to [Tenneco], . . . obtain[ed] title to the crude oil . . ., subsequently transferr[ed] title . . . back to [Tenneco], and charge[d] a fee for the service." 10 C.F.R. § 212.82. It created no regulatory supply obligation from Kern to Tenneco. *See* 10 C.F.R. §§ 211.63, 212.82; *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980).

7. The intent of the Mandatory Petroleum Allocation Regulations, 10 C.F.R. Part 211, was to protect small independent refiners (such as Kern) against the interruption of their crude supplies by major integrated oil companies (such as Tenneco) during the energy shortage, and to ensure that integrated oil companies owning or controlling crude oil production could not use that control to restructure crude distribution in their own interests at the expense of the historic purchasers of the crude. H.R. Conf. Rep. No. 93-628, 93d Cong. 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2688, 2689; *Cibro*

Petroleum Products, Inc. v. Sohio Alaska Petroleum Co., 602 F. Supp. 1520 (N.D.N.Y. 1985), *aff'd*, No. 2-47 (TECA July 10, 1986); *Basin, Inc. v. Federal Energy Administration*, 552 F.2d 931 (TECA 1977), *cert. denied*, 434 U.S. 821 (1977). Because the aim of the July 1978 agreement was to transfer Tenneco crude back to Tenneco, the original supplier and an integrated oil company, to the detriment of Kern, the historical purchaser and a small independent refiner, it did not create a supply obligation in Kern. Any interpretation to the contrary would directly contravene the intent of the allocation program. *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980); *Shell Oil Co.*, 6 Energy Mgmt. (CCH) ¶ 56,301 (June 28, 1976).

8. Because the July 1978 agreement was a transportation service agreement, it did not satisfy or diminish Tenneco's regulatory supply obligations and Kern's acquiescence to that agreement did not waive, terminate or modify Tenneco's obligations to Kern. *See* 10 C.F.R. §§ 211.63, 212.82; *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980); *Shell Oil Co., supra*; *State of Alaska*, 6 Energy Mgmt. (CCH) ¶ 56,344 (April 27, 1977).

9. If the July 1978 agreement had been a true "sales" agreement and created a regulatory supply obligation from Kern to Tenneco, then that obligation ceased when the parties terminated the July 1978 agreement and replaced it with the February 1979 transportation agreement. The February 1979 agreement superseded the July 1978 agreement.

10. The February 1979 agreement was a transportation service arrangement under 10 C.F.R. § 212.82 and created no regulatory supply obligations in either party. *Basin, Inc.*, 6 Energy Mgmt. (CCH) ¶ 56,486 (March 31, 1980); *Shell Oil Co., supra.*

11. The February 1979 agreement had no effect on Tenneco's regulatory supply obligations to Kern. *See J &W Refining Co.*, [1975-76 Transfer Binder] Energy Mgmt. (CCH) ¶ 80,602 (Mar. 19, 1976).

12. Tenneco, by failing to sell to Kern all of the crude from each Yowlumne property identified in the October 1975 contract and each Yowlume property from which Tenneco thereafter sold crude to Kern, including Sections 33 and 34, violated § 211.63 of the Mandatory Petroleum Allocation Regulations, 10 C.F.R. § 211.63.

13. Kern was injured by Tenneco's violation of 10 C.F.R. § 211.63.

14. Section 210 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, gives Kern the right to bring a private action against Tenneco for violation of 10 C.F.R. § 211.63.

15. Kern's regulatory claim is not barred by the applicable 3-year statute of limitations. Claims under the allocation regulations do not accrue until the defendant commits an act that injures the plaintiff. *See, e.g., Oerther v. Pennzoil Co.*, 763 F.2d 420 (TECA 1985); *Siegel Oil Co. v. Gulf Oil Corp.*, 701 F.2d 149 (TECA 1983). Kern was not injured by Tenneco's conduct until April 1979; hence its July 1, 1981 complaint in Case No. CV 81-3253 was filed on a timely basis. Even if Kern had been injured earlier than April 1979, throughout 1978 Tenneco made numerous sales of crude to various third parties and each month took ever increasing amounts of crude for itself, and each of these wrongful acts gave rise to a new cause of action. *Johnson Oil Co. v. United States Department of Energy*, 690 F.2d 191 (TECA 1982). Finally, even if Kern's complaint had been filed late, the limitations period is deemed equitably tolled here because Kern reasonably and in good faith sought administrative relief within a month after having discovered Tenneco's true intentions and filed its com-

plaint here six days after receiving notice that the remedial administrative action against Tenneco was to be terminated. *See Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 191 Cal. Rptr. 681 (1983); *Burnett v. New York Central Railroad*, 390 U.S. 424 (1965).

16. This Court finds for Kern, and against Tenneco, on the First Cause of Action.

Breach of Contract

17. Where the parties have stipulated to the law that shall control their contractual dispute, that stipulation will be honored. Pursuant to the terms of the May 1977 contract, Texas law governs the breach of contract claims.

18. The May 1977 contract unambiguously obligated Tenneco to sell outright to Kern all production from the Yowlumne properties specified in Exhibit A to that contract. The parties' contemporaneous oral agreement, which was consistent with their prior course of dealing, modified the May 1977 contract and obligated Tenneco also to sell Kern all crude from Yowlumne properties coming into production after the execution of that contract. The statute of frauds is satisfied because the modification is documented by Tenneco's invoices stating that sales from newly producing properties were "per contract of May 19, 1977." Moreover, because of Judge Real's findings in Case No. CV 81-0791 and Tenneco's stipulation in that case regarding the oral agreement, Tenneco is collaterally estopped from relitigating the oral modification issue. *See United States v. Mendoza*, 464 U.S. 154 (1984).

19. The relationship between Tenneco and Kern established under the May 1977 contract was that of seller and buyer, not that of principal and agent. *See Johnson v. Owens*, 629 S.W.2d 873 (Tex. Civ. App. 1982).

20. Tenneco's obligation to sell all its Yowlumne crude to Kern was unconditional. If Tenneco's intent was to

the contrary, it never informed Kern of that intent, and unexpressed intent will not be given effect to vary the terms of the contract. *American Refining Co. v. Sims Oil Co.*, 282 S.W. 894 (Tex. Civ. App. 1926). Moreover, Judge Real's findings in Case No. CV 81-0791 collaterally estop Tenneco from relitigating whether it was obligated to sell Kern volumes of crude in excess of the volume of Kern's deliveries to Tenneco east of the Rockies and whether sales in excess of those deliveries were intended to be only temporary.

21. Because the July 1978 agreement was entered into for the sole purpose of facilitating Tenneco's transportation of surplus Yowlumne crude through the Texaco pipeline back to itself, it did not establish a contractual obligation on Kern's part to sell Yowlumne crude to Tenneco.

22. By entering into the July 1978 agreement, Kern did not waive or modify its rights under the May 1977 agreement, and the oral modification of that agreement, to receive all Tenneco Yowlumne crude. Waiver and modification require a voluntary relinquishment of a known right, as well as acts, words or conduct manifesting an unequivocal intention to abandon that right. *See Bodovsky v. Texoma National Bank of Sherman*, 584 S.W.2d 868 (Tex. Civ. App. 1979). Kern, by agreeing to a transportation arrangement for surplus crude, did not knowingly or voluntarily give up its contractual right to purchase Tenneco Yowlumne crude needed for its refinery. Moreover, even if Kern had waived rights established pursuant to the May 1977 contract by entering into the July 1978 agreement, any such waiver was retracted in early January 1979 when Kern insisted that Tenneco henceforth honor its supply obligations. U.C.C. § 2-209(5); *Hart v. Simms*, 702 F.2d 574 (5th Cir. 1983).

23. The February 1979 agreement terminated and replaced the July 1978 agreement, but did not terminate, replace or affect the May 1977 contract. Kern, by enter-

ing into the February 1979 agreement, did not expressly or impliedly waive its rights under the May 1977 contract or modify that contract in any respect. *See Bodovsky, supra,* 584 S.W.2d at 873; *Jordan Drilling Co. v. Starr,* 232 S.W.2d 149, 159-60 (Tex. Civ. App. 1949); *Butler, Williams & Jones v. Goodrich,* 306 S.W.2d 798 (Tex. Civ. App. 1957).

24. Tenneco breached the May 1977 contract by failing to sell all its Yowlumne crude production to Kern.

25. Implied in the May 1977 contract is a convenant of good faith and fair dealing that imposed upon Tenneco a duty to deal in good faith with Kern and to do nothing that would deprive Kern of the benefits of the contract. U.C.C. §§ 1-203, 1-201(19), 2-103(1)(b). When Tenneco deliberately decided to give priority to its own refinery needs over Kern's contractual rights, Tenneco disregarded its duty of good faith and thereby breached the covenant implied in the contract.

26. Kern was injured by Tenneco's breach of contract.

27. Kern's causes of action for breach of contract are not barred by *res judicata.* Kern did not impermissibly split its causes of action. Restatement (Second) of Judgments § 26(1)(a) (1982); *see Harbeson v. Parke Davis, Inc.,* 746 F.2d 517, 520-21 (9th Cir. 1984).

28. Kern's causes of action for breach of contract are not barred by the applicable 4-year statute of limitations. Kern's causes of action did not accrue until mid-January 1979 at the earliest.

29. Even if Tenneco had breached the May 1977 contract prior to January 1979, Kern filed its complaint for breach of federal regulations on July 1, 1981. Because both the regulatory and contractual causes of action arise out of precisely the same conduct, transactions and occurrences, Kern's breach of contract claims relate back to July 1, 1981 and are not barred by the statute of limita-

tions. Fed. R. Civ. P. 15(c); *see In re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370 (N.D. Ill. 1985). Kern's claims for breach of contract would relate back to July 1, 1981 even if Kern's regulatory complaint were time barred. *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982).

30. Even if Tenneco's first breach occurred prior to January 1979, Kern was entitled to elect to continue performance under the contract and to treat Tenneco's improper performance as a partial breach, thus retaining a claim for damages caused by subsequent breaches. *Cities Service Helex, Inc. v. United States*, 543 F.2d 1306 (Ct. Cl. 1976); *Airco, Inc. v. Niagra Mohawk Power Corp.*, 430 N.Y.S.2d 179 (App. Div. 1980). Tenneco's conduct before mid-January 1979 was not an anticipatory repudiation of the May 1977 contract since Tenneco did not, until then, unequivocally and absolutely refuse to perform. *See, e.g., Mackenzie v. Farr*, 541 S.W.2d 879 (Tex. Civ. App. 1976); *Cooper v. Wildman*, 528 S.W.2d 80 (Tex. Civ. App. 1975). Moreover, repudiation is not actionable unless it substantially impairs the value of the contract, U.C.C. § 2-610; *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973). Since Kern was not damaged by Tenneco's actions until April 1979, Tenneco's pre-1979 conduct did not substantially impair the contract's value to Kern and thus did not constitute an anticipatory repudiation.

31. This Court finds for Kern, and against Tenneco, on the Fifth, Sixth, and Seventh Causes of Action.

Fraud and Misrepresentation

32. Alternatively, if the July 1978 agreement adversely affected Kern's regulatory or contractual supply rights, then Tenneco committed fraud and misrepresentation (a) by concealing from Kern its intent to use the July 1978 agreement eventually to take all Yowlumne crude away from Kern and (b) by assuring Kern that

Kern's refinery needs would be met. Cal. Civ. Code §§ 1709, 1710.

33. Kern did not ratify or waive the fraud and misrepresentation by executing the July 1978 agreement in October 1978. The memorialization of the agreement was a mere formality without legal significance. *See Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022 (5th Cir. 1980). When Kern executed the agreement, it had been led to believe that Tenneco would provide Kern sufficient crude for its refinery needs. Neither waiver nor modification can be implied. *See Lobdell v. Miller*, 114 Cal. App. 2d 328, 250 P.2d 357 (1952).

34. Kern's fraud and misrepresentation claims are not barred by *res judicata*. Kern did not impermissibly split its causes of action. Restatement (Second) of Judgments § 26(1)(a) (1982); *see Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520-21 (9th Cir. 1984).

35. Kern's fraud and misrepresentation claims are not barred by the applicable statutes of limitations. They relate back to July 1, 1981 because they arise out of the same conduct, transactions and occurrences as Kern's regulatory claim, Fed. R. Civ. P. 15(c), even if the latter claim was itself time-barred, *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982).

36. This Court finds for Kern, and against Tenneco, on the Second, Third, and Fourth Causes of Action.

Laches

37. None of Kern's causes of action is barred by laches because all of them are legal in nature. *See, e.g., American Insurance Co. v. First Savings & Loan Association*, 434 S.W.2d 170 (Tex. Civ. App. 1968).

Damages

38. Kern lost refinery profits because of Tenneco's breach of regulations, breach of contract, fraud and mis-

representation. Lost profits resulting from violation of the Mandatory Petroleum Allocation Regulations are recoverable under § 210(a) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. Lost profits resulting from breach of contract are recoverable under U.C.C. § 2-718(2)(a). Lost profits caused by fraud and misrepresentation are recoverable under U.C.C. § 2-721 and Cal. Civ. Code § 3343. *See Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

39. Because Tenneco did not rely on Kern's request to the DOE for 7,000 Tenneco barrels per day and because Tenneco suffered no detriment as a consequence of that request, Kern is not estopped from claiming damages here. *See Gulbenkian v. Penn*, 252 S.W.2d 929 (Tex. 1952); *Stanley Educational Methods, Inc. v. Becker CPA Review Course, Inc.*, 536 F.2d 86 (5th Cir. 1976).

40. Kern does not have to prove foreseeability of damages to recover its lost profits on its regulatory claim. In any event, Tenneco could reasonably foresee that Kern would be damaged if Tenneco failed to sell the required amounts of Yowlumne crude to Kern. It was not necessary that Tenneco foresee the specific injury or specific amount of harm. *Barnard v. Compugraphic Corporation*, 667 P.2d 117 (Wash. App. 1983); *Dale Truck Line v. R & M Well Servicing & Drilling Co.*, 286 S.W.2d 446 (Tex. Civ. App. 1956).

41. Even though the May 1977 contract contained a 90-day termination clause, Kern's damages are not limited to those occurring within 90 days of the breach. Tenneco did not terminate the contract until November 30, 1980, and Kern's rights to damages based on breaches prior to that date survive. U.C.C. § 2-106(3).

42. Kern's damage calculation is not speculative or uncertain. Each element of it is thoroughly documented in the evidence. Damages for lost profits need not be

proved with mathematical certainty, provided an award has a rational basis in the evidence. *Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814 (1st Cir.), *cert. denied*, 464 U.S. 894 (1983); *see Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 (1963). In any event, a party who breaks his contract cannot escape liability merely because it is impossible for a plaintiff to state or prove a perfect measure of damages. *Southwest Battery Corporation v. Owens*, 115 S.W.2d 1097, 1099 (Tex. 1938).

43. The burden was on Tenneco to refute Kern's prima facie evidence of its damages. *Cibro Petroleum Products, Inc. v. Sohio Alaska Petroleum Company*, 602 F. Supp. 1520 (N.D.N.Y. 1985), *aff'd*, No. 2-47 (TECA July 10, 1986). Tenneco failed to meet this burden. Its evidence did not sustain the positions asserted by Tenneco, and Kern's countervailing evidence was more persuasive.

44. Evidence of the performance of Kern's refinery after the damage period is relevant and admissible to show that Kern could have processed the non-delivered Yowlumne crude. *See Louis v. Mobil Oil Corporation*, 438 F.2d 500 (8th Cir. 1971); *Multivision Northwest, Inc. v. Jerrold Electronics Corporation*, 356 F. Supp. 207 (N.D. Ga. 1972).

45. Tenneco is collaterally estopped from arguing that Kern would have had to pay any more than "upper-tier" price for any Tenneco Yowlumne crude. Judge Real's Findings of Fact and Conclusions of Law in Case No. 81-0791 establish that the May 1977 contract required Tenneco's sales to Kern beyond the first 3,000 barrels per day to be at upper-tier price.

46. Kern is entitled to rely upon the DOE grants of exception relief to Kern for the entirety of fiscal 1980. The fact that portions of those grants were retroactive does not invalidate or modify Kern's damage claim.

Tenneco must take those orders as it finds them; it cannot collaterally attack those DOE orders in this litigation. *Callanan Road Improvement Company v. United States*, 345 U.S. 507 (1953); *Adams v. Nagel*, 303 U.S. 532 (1938). Moreover, as Tenneco was not a party to the exception relief proceedings, it has no standing to attack those DOE orders.

47. This Court's order of October 11, 1985 that the protective order prohibited Tenneco from disclosing to the DOE confidential documents obtained in this litigation does not preclude Kern from relying on the DOE orders granting it exception relief.

48. Tenneco's defense regarding Kern's alleged avoidance of entitlements obligations supposedly arising from crude oil transactions with third parties is irrelevant to this litigation. Even if the DOE were to take action against Kern in connection with those transactions, it would do so in a separate remedial proceeding that would have no effect on the exception relief orders Kern relies on in its damage calculation. *See USA Petroleum Company*, 12 DOE ¶ 82,503 (1984).

49. Tenneco's accusations of illegality regarding Kern's transactions with third parties are irrelevant here for the following additional reason: even if Kern owed entitlements as a result of those transactions, the amount of exception relief for which Kern was eligible during fiscal 1980 was large enough to cover the fiscal 1980 obligations associated with all crude refined by Kern, including crude obtained in the alleged entitlements avoidance transactions. As Tenneco conceded, in such circumstances Kern's damage claim would be unaffected.

50. In any event, Kern's transactions with third parties did not violate the DOE regulations. Kern followed the regulations, 10 C.F.R. § 212.131(b), correctly transferring certifications on direct sales and retaining them when crude was exchanged. There is no evidence that anyone miscertified the crude.

51. Kern, in good faith, made commercially reasonable efforts to mitigate its damages. Although its attemps at mitigation caused it further loss in four of the twenty months of its damages, the test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner. It is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective. U.C.C. § 2-712, comment 2. The rule of mitigation of damages may not be invoked by Tenneco, a contract breaker, as a basis for hypercritical examination of Kern's conduct or merely for the purpose of showing that Kern might have taken steps which seemed wiser or which would have been more advantageous to Tenneco. *S.J. Groves & Sons Company v. Warner Company*, 576 F.2d 524 (3d Cir. 1978). Consequently, Kern's damages cannot be reduced merely because its mitigation efforts in four months were unsuccessful.

52. Kern is entitled to recover from Tenneco $16,761,639 in damages for lost profits.

Attorneys' Fees

53. Under Texas law, Kern is entitled to recover its attorneys' fees and related costs incurred in prosecuting its breach of contract claim. Tex. Civ. Prac. & Remedies Code § 38 (1985). Such fees and costs also include those incurred in connection with Kern's claims for breach of regulations, misrepresentation and fraud and its defense of Tenneco's counterclaims to the extent that those claims are so inextricably bound to Kern's breach of contract claim that no distinction can be made between the legal services rendered and costs incurred. *Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860 (Tex. Civ. App. 1980). Under the Texas law and Fed. R. Civ. P. 11, Kern is also entitled to recover its attorneys' fees and costs incurred in defending against Tenneco's post-trial motions heard on August 4, 1986. Pursuant to Local Rule 16.10, Kern

shall move for a hearing to determine the precise amount to be awarded pursuant to this paragraph.

Interest

54. Kern was not required to pray for prejudgment interest in its complaint. Fed. R. Civ. P. 54(c); *Crown Central Petroleum Corp. v. National Union Fire Insurance Company*, 768 F.2d 632, 638 (5th Cir. 1985).

55. Under Texas law, Kern is entitled to prejudgment interest on its breach of contract claims. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 553-54 (Tex. 1985); *Crown Central Petroleum Corp. v. National Union Fire Insurance Company*, 768 F.2d 632 (5th Cir. 1985). Texas law gives this Court discretion to base its awards of prejudgment interest on either a statutory or an equitable basis. *Larcon Petroleum, Inc. v. Autotronic Systems, Inc.*, 576 S.W.2d 873, 879 (Tex. Civ. App. 1979). In light of the high interest rates that existed between 1979 and the present date, this Court finds that Kern is entitled to prejudgment interest on an equitable basis. Accordingly, pursuant to *Cavnar* and Tex. Rev. Civ. Stat. Ann. art. 5,069-1.05 § 2, Kern is entitled to prejudgment interest in the amount of $12,836,980 (the amount due as of January 15, 1986), plus additional prejudgment interest computed at the rate of ten percent from January 15, 1986 to the date of this decision, plus post-judgment interest at the rate of 10 percent until judgment is paid, all interest to be compounded daily.

56. Kern is also entitled to, and is hereby awarded, prejudgment interest on its regulatory claim. The general federal rule is that, in the absence of a statutory provision, the award of prejudgment interest is in the discretion of the Court. *Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977). No statute regulates the award of prejudgment interest on Kern's breach of regulations claim. Even though the amount of Kern's damages was

not liquidated, Kern's loss would not be fully compensated if it were confined to only the principal amount. A distinction between cases of liquidated and unliquidated damages in deciding whether to award prejudgment interest is not a sound one. *Funkhouser v. J.B. Preston Company*, 290 U.S. 163, 168-69 (1933); *Miller v. Robertson*, 266 U.S. 243, 258 (1924). The decision is one of equity and discretion in the trial court, *Eastern Airlines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1408 (TECA), *cert. denied*, 464 U.S. 915 (1983); *Gulf Oil Company v. Dyke*, 734 F.2d 797, 806 (TECA 1983), *cert. denied*, 105 S. Ct. 173 (1984), and Kern is here equitably entitled to prejudgment interest on its regulatory claim. In this respect, as in all other aspects of these findings and conclusions, Tenneco should not be allowed to profit from its own wrongdoing. Interest is awarded to Kern in the amount of $15,180,303 (the amount due as of January 15, 1986), plus prejudgment interest on $16,761,639 damage award as may accrue from January 15, 1986 until date of this judgment, computed in accordance with 28 U.S.C. § 1961.

57. Kern shall be entitled to post-judgment interest, computed in accordance with 28 U.S.C. § 1961, on the damage award, all attorneys' fees and costs awarded, all prejudgment interest awarded and all costs of action awarded, from the date of this judgment until payment.

Tenneco's Fraud Counterclaim

58. A purchaser cannot by oral statement waive in advance, its regulatory right to a continuing supply of crude oil. 10 C.F.R. § 211.63(d); *see also Giant Industries, supra*; *Arizona Fuels Corporation, supra*. Kern did not represent to Tenneco that Kern would refrain from asserting a violation of regulatory supply obligations, and even if such representations had been made, there would be no effect on either Kern's regulatory or contract claims.

59. This Court finds for Kern, and against Tenneco, on Tenneco's Fourth Counterclaim.

Judgment

61. Judgment is to be entered in favor of Kern and against Tenneco on the First, Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action of Kern's Consolidated Second Amended Complaint and in favor of Kern against Tenneco on Tenneco's Fourth Counterclaim (Tenneco's other counterclaims having already been dismissed and/or judgment thereon having already been granted in favor of Kern). Said judgment is a final order under Fed. R. Civ. P. 54(b).

DATED 10 Oct., 1986

/s/ Laughlin E. Waters
THE HONORABLE LAUGHLIN E. WATERS
Judge, United States District Court

Submitted September 5, 1986 by:

RICHARD E. SHERWOOD
SUZANNE F. DUFF
VERA P. PARDEE
O'MELVENY & MYERS

/s/ Suzanne F. Duff
SUZANNE F. DUFF

Attorneys for Plaintiff and
Counter-Defendant Kern Oil &
Refining Co.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Number CV 81-3253 LEW (KX)

KERN COUNTY REFINERY, INC.,
Plaintiff(s)

vs

TENNECO OIL CO.,
Defendant(s)

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that findings of fact & conclusions of law after trial in the above entitled case was entered in the docket on 11/24/86 under seal.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on 11/24/86, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

O'MELVENY & MYERS
400 S. Hope Street
Los Angeles, CA 90071

ROBERT D. SACK
GIBSON, DUNN & CRUTCHER
9 West 57th Street
NY, NY 10019

GIBSON, DUNN & CRUTCHER
333 S. Grand Ave.
Los Angeles, CA 90071

J. MICHAEL HENNINGAN,ETC.
HENNIGAN & MERCER
611 W. 6th Street
28th Floor
Los Angeles, CA 90017

JOHN MATHIS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

LARRY L. SIMMS
1050 Connecticut Ave., N.W.
Washington, D.C. 20536

RALPH J. MAYNARD
POB 2511
Houston, TX 77001

Clerk, U.S. District Court

By /s/ [illegible]
Deputy Clerk

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Nos. CV-81-3253 LEW (Kx) &
82-6875 LEW (Kx)

KERN OIL & REFINING CO.,
Plaintiff,

v.

TENNECO OIL COMPANY,
Defendant.

[Filed Jan. 31, 1984]

STIPULATION TO ENTRY OF PROTECTIVE ORDER

Subject to the approval of the Court, plaintiff Kern Oil & Refining Co. ("Kern") and defendant Tenneco Oil Company ("Tenneco") hereby stipulate and agree to the entry of a protective order regarding the treatment of confidential commercial information on the terms and conditions set forth below.

1. Kern and Tenneco agree that all materials provided by either party in the course of discovery in Case Nos. 81-3253 LEW (Kx) and 82-6875 LEW (Kx) ("these cases") shall be deemed to contain confidential commercial information unless specifically designated by the providing party as not containing such information.

2. All such confidential materials provided by Kern to Tenneco or by Tenneco to Kern in the course of discovery in these cases shall be retained by counsel for Kern or by counsel for Tenneco and shall not be disclosed or used by such counsel, or by Kern or Tenneco, other than in connection with these cases. For the purposes of this Order, reference to counsel for Kern and counsel for Tenneco shall mean the parties' respective attorneys of record in these cases.

3. Any such materials, copies of extracts therefrom, or information therein may be disclosed *only* in connection with the litigation of these cases and only to attorneys employed by Kern or Tenneco, to employees, consultants, or agents of Kern or Tenneco, or to witnesses in these cases.

Such materials, copies of extracts therefrom, or information therein shall not be disclosed for any purpose other than in connection with the litigation of these cases, and, except pursuant to the procedures set forth in paragraph 5, shall not be disclosed to any person or entity other than those stated above.

4. With the exception of attorneys employed by Kern or Tenneco, each person to whom disclosure is to be made shall, before disclosure is made to him or her, acknowledge in writing that he or she is familiar with the terms of this Order and that he or she agrees to be bound thereby. All such written acknowledgements shall be maintained by the attorney making the disclosure and shall be available for inspection and copying upon request by counsel for either party in these cases.

5. If an attorney for either Kern or Tenneco desires to disclose any confidential materials, copies of extracts therefrom, or information therein to any person who is not specifically authorized to have access to such materials, extracts, or information pursuant to paragraph 3,

the attorney must first disclose to whom he desires to give or disclose the materials, extracts, or information, and must obtain the written consent of the attorney for the providing party, which consent shall not be unreasonably withheld. If such written consent is not given within ten days after the request is made, the requesting party may move the Court for an order permitting the disclosure.

6. In connection with any submission made by Kern or Tenneco to the Court in these cases which contains confidential materials, the submitting party shall enclose the submission in a sealed envelope marked with the caption of the case and with the statement that confidential material under protective order is contained therein. The Clerk of the Court shall file and maintain the submission in the sealed envelope, to be opened only on direction of the Court.

7. The foregoing restrictions on disclosure and the use of confidential information shall not apply to documents and information which, at or prior to disclosure thereof, is or was public knowledge, or which becomes public knowledge as a result of publication by one having the unrestricted right to do so, or which the providing party designates as not confidential for any reason.

8. Within a reasonable time after completion of these cases, the originals and any copies of confidential material covered by this order shall be returned to the providing party or shall be destroyed, and a verified statement confirming the destruction shall be supplied by counsel for the opposite party.

9. The parties' agreement to this Order is evidenced by the signatures of counsel affixed hereto.

DATED: 1-26-84

/s/ John P. Mathis
JOHN P. MATHIS
KIRK K. VAN TINE
CHARLES B. MCDONALD
BAKER & BOTTS

DATED: 1-27-84

/s/ Elizabeth A. Grimes
R. RANDALL HUFF
ELIZABETH A. GRIMES
GIBSON, DUNN & CRUTCHER
Attorneys for Defendant
Tenneco Oil Company

DATED: 1-27-84

/s/ John P. Lenich
RICHARD E. SHERWOOD
JOHN P. LENICH
SUZANNE F. DUFF
O'MELVENY & MYERS
Attorneys for Plaintiff
Kern Oil & Refining Co.

ORDER

IT IS SO ORDERED.

DATED: 31 Jan 84

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

APPENDIX L

PERTINENT CONSTITUTIONAL PROVISION AND RULES

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press, or the right of the people * * * to petition the Government for a redress of grievances."

Rule 26(c) of the Federal Rules of Civil Procedure provides, in pertinent part:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending * * * may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and

conditions as are just, order that any party or person provide or permit discovery.

Rule 52 of the Federal Rules of Civil Procedure provides, in pertinent part:

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 * * *.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. * * *

Rule 59 of the Federal Rules of Civil Procedure provides, in pertinent part:

New Trials; Amendment of Judgments

(a) Grounds. * * * On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

APPENDIX M

RULE 28.1 STATEMENT

Tenneco Oil Company is wholly-owned by Tenneco Corporation, which is wholly-owned by Tennessee Gas Pipeline Company, which in turn is wholly-owned by Tenneco Inc. A complete listing of all subsidiaries and affiliates of Tenneco Inc. follows:

TENNECO INC. AND SUBSIDIARIES AND AFFILIATES

As of May 31, 1988

TENNECO INC. (Delaware)	
Tenneco Management Company (Delaware)	100%
Tennessee Gas Pipeline Company (Delaware)	100
Agricultural & Industrial Management, Inc. (Delaware)	100
Albright & Wilson Americas Inc. (Delaware)	100
Chemrich, Inc. (Louisiana)	100
Brake-Pro Systems Inc. (Delaware)	100
DeKoven Manufacturing Co. (Wisconsin)	100
East Tennessee Natural Gas Company (Tennessee)	100
Eastern Insurance Company Limited (Bermuda)	100
ERCO Industries Inc. (Delaware)	100
Intake Water Company (Delaware)	100
Kern River Corporation (Delaware)	100
Kern River Gas Transmission Company (Texas General Partnership) (Kern River Corporation has 50% ownership as General Partner and Williams Western Pipeline Company, an unaffiliated company, has 50% ownership as General Partner)	
Kern River Gas Supply Corporation (Delaware) (50% ownership by The Williams Companies, an outside company)	50
Kern River Service Corporation (Delaware) (50% ownership by The Williams Companies, an outside company)	50
Land Ventures Inc. (Delaware)	100
Lorneterm LNG Limited (Canada)	100
Midwestern Gas Marketing Company (Delaware)	100

Midwestern Gas Transmission Company (Delaware)	100%
Viking Gas Transmission Company (Delaware)	100
Monroe Auto Equipment Company (Delaware)	100
E-Z Ride Shock Absorber Company (Michigan)	100
McPherson Struct Company Inc (Delaware)	100
Monroe Argentina S.A.I.C. y F. (Argentina)	100
Monroe Auto Equipement France S.A. (France)	100
Regal Ride Shock Absorber Company (Michigan)	100
Sudinpar Holding Etablissement (Liechtenstein)	100
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)	98
Tenneco Automotive International Sales Corporation (Delaware)	100
Tenneco Automotive Japan Ltd. (Japan)	100
New Tenn Company (Delaware)	100
Northeastern Gas Transmission Company (Delaware)	100
Tenneco Alaska, Inc. (Delaware)	100
Tenneco China Trade Inc. (Delaware)	100
Tenneco United Company (a Texas General Partnership) (Tenneco China Trade, Inc. has 50% ownership and Indamerica International, Inc., a California corporation, has 50% ownership.)	
Tenneco Coal Company (Delaware)	100
Tenneco Communications Corporation (Delaware)	100
Tenneco Corporation (Delaware)	100
Bloor Automotive Inc. (Delaware)	100
Discoverer Services, Inc. (Delaware)	100
Blue Flame Gas Corporation (Delaware)	100
Channel Industries Gas Company (Delaware)	100
Collins Pipeline Company (Delaware)	80
Columbine Casualty Company (Colorado)	100
G & T Pipeline Company (Delaware)	100
Kern County Land Company (Delaware)	100
J. I. Case Company (Delaware)	100
The Case Company (Wisconsin)	100
Case Engine Holding Company, Inc. (Delaware)	100
Consolidated Diesel Company (North Carolina Partnership)	50
(Case Engine Holding Company, Inc. (Delaware) has 50% ownership as General Partner and Cummins Engine Holding Company, Inc. (Indiana), an unaffiliated company, has 50% ownership as General Partner)	
Consolidated Diesel, Inc. (Delaware)	100

Case Ventures Corporation (Delaware)	100%
Hay & Forage Industries (Kansas Partnership)	50
(Case Ventures Corporation (Delaware) has 50% ownership as General Partner and Hesston Ventures Corporation (Kansas), an unaffiliated company, has 50% ownership as General Partner)	
Grand Detour Plow Company (Wisconsin)	100
Kase, S.A. De C.V. (Mexico)	100
J. I. Case Argentina, S.A. (Argentina)	100
J. I. Case Credit Corporation (Wisconsin)	100
J. I. Case International, S.A. (Venezuela)	100
J. I. Case Leasing Corporation (Wisconsin)	100
J. I. Case Mfg. Company, Inc. (Wyoming)	100
J. I. Case Threshing Machine Company (Wisconsin)	100
Pryor Foundry, Inc. (Oklahoma)	100
Steiger Tractor, Inc. (Delaware)	100
Integrated Technical Systems, Inc. (North Dakota)	100
Steiger Australia Ltd. (North Dakota)	100
Steiger Financial Corp. (Pty) Ltd. (Australia)	100
Steiger Canada Ltd. (Canada)	100
Steiger Credit Company (North Dakota)	100
Steiger Credit Canada Ltd. (Canada)	100
Steiger International, Ltd. (Guam)	100
Tenneco Canada Inc. (Ontario)	100
Albright & Wilson Americas Inc. (Canada)	100
Dunville Mining Co. Limited (Alberta)	100
Electric Reduction Sales Co., Ltd. (Canada)	100
ERCO Industries of Canada Limited (Canada)	100
J. I. Case do Brasil & Cia. (Brazil)	100
Case Capital Assets Management S/C Ltda. (Brazil)	100

Monroe do Brasil Industria e Comercio Ltda. (Brazil)	100%
Monroe Auto Pecas S.A. (Brazil)	80
Productora Andina de Acidos y Derivados Ltda (Colombia)	49
Tenneco Credit Canada Corp. (Alberta)	100
Tenneco West, Inc. (Delaware)	100
Boquillas Cattle Company (Arizona)	100
Kern County Land Company, Inc. (California)	100
Tenneco Realty Development Corporation (Delaware)	100
Tenneco Arizona Property Corporation (Arizona)	100
LHC Pipeline Company (Delaware)	100
Marlin Drilling Co., Inc. (Delaware)	100
Bluefin Supply Company (Delaware)	100
Marlin International Drilling Company (Delaware)	100
Marlin Colombia Drilling Co., Inc. (Caymay Islands)	100
Marlin Colombia Drilling Co. Inc. (Delaware)	100
Marlin-West Drilling Co., Inc. (Delaware)	100
Mitchell Supreme Fuel Company (Delaware)	100
Petro-Tex Chemical Corporation (Delaware)	100
State Gas Pipeline Company (Delaware)	100
SWL Security Corp. (Texas)	100
T & M Terminal Company (Delaware)	80
TGP Corporation (Delaware)	100
THC Pipeline Company (Delaware)	100
Tenneco Automotive Retail Service Systems, Inc. (Delaware)	100
Tenneco Aviation Limited (Delaware)	100
Tenneco Credit Corporation (Delaware)	100
Counce Limited Partnership (Texas Limited Partnership) (Tenneco Credit Corporation has 95% ownership as Limited Partner and Tenneco InterAmerica Inc. has 5% ownership as General Partner)	
Counce Finance Corporation (Delaware)	100
Tenneco Storage Limited Partnership (Louisiana Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50 % ownership as Limited Partner)	
Tenneco Storage Capital Corporation (Delaware)	100

- Tenneco Cogeneration Development Company (Delaware) — 100%
- Tenneco Insurance Ventures Inc. (Delaware) — 100
- Tenneco Inc. (Nevada) — 100
- Tenneco InterAmerica Inc. (Delaware) — 100
  - Counce Limited Partnership (Texas Limited Partnership) (Tenneco InterAmerica Inc. has 5% ownership as General Partner and Tenneco Credit Corporation has 95% ownership as Limited Partner)
    - Counce Finance Corporation (Delaware) — 100
  - LIG Chemical Company (Louisiana) — 100
  - Louisiana Intrastate Gas Corporation (Louisiana) — 100
  - Newport News Shipbuilding and Dry Dock Company (Virginia) — 100
    - Asheville Industries Inc. (North Carolina) — 100
    - Greeneville Metal Manufacturing, Inc. (Virginia) — 100
    - The James River Oyster Corporation (Virginia) — 100
    - Newport News Industrial Corporation (Virginia) — 100
      - Newport News Industrial Corporation of Ohio (Ohio) — 100
    - Newport News Reactor Services, Inc. (Virginia) — 100
    - Sperry Marine Inc. (Delaware) — 100
    - Sperry Marine - Asia Inc. (Virginia) — 100
  - Packaging Corporation of America (Delaware) — 100
    - The Corinth and Counce Railroad Company (Mississippi) — 100
    - Economy Printing & Lithographing Co. (Texas) — 100
    - Alcan Ekco Limited (United Kingdom) — 50
    - A/S Haustrup-Ekco Aluminum-Emballage (Denmark) — 50
      - Plus Pack AB Svenska Haustrup-Ekco (Sweden) — 100
      - Plus Pack A/S (Norway) — 100
      - Plus Pack GmbH (Austria) — 100
      - Plus Pack GmbH (Switzerland) — 100
    - Ekco N.V. (Belgium) — 100
      - Ekco S.A.R.L. (France) — 1
    - Ekco S.A.R.L. (France) — 99
    - Middleton Brokerage Co., Inc. (California) — 100

Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan) 50%
Skogstre A/S Norway) 50
Western Packaging, Inc. (Colorado) 100
Tuscaloosa Pipeline Company (Louisiana) 100
Tenneco Minerals Company (Delaware) 100
Prometheus Minerals (Canada) Ltd. (Canada) 100
Tenneco Minerals Company of Australia, Inc. (Delaware) 100
Windy Point Minerals, Ltd. (Canada) 100
Tenneco Oil Company (Delaware) 100
Caldyne, Inc. (Delaware) 100
FC Marine Inc. (Delaware) 75
(Skips A/S Tudor owns 25%)
Argosy Offshore Ltd. (Texas Limited Partnership)
(FC Marine Inc. has 1% ownership as General Partner; Houston Oil and Minerals Corporation has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)
Greene's Propane Gas Corporation (Georgia) 100
Houston Oil & Minerals Corporation (Nevada) 100
Argosy Offshore Ltd. (Texas Limited Partnership)
(FC Marine Inc. has 1% ownership as General Partner; Houston Oil and Minerals Corporation has 74%ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)
Houston Oil & Minerals Exploration Company (Texas) 100
Houston Oil International, Inc. (Texas) 100
HOCOL, S.A. (Cayman Islands) 100
Agencias Petroleras, Ltda. (Colombia) 100
Case Poclain S.A. (France) 78
Establissement Lacroix S.A. (France) 100
Establissement L. Bouilloux S.A. (France) 98
Poclain Italiana SpA (Italy) 99
Societe Francaise Immobiliere Franim (France) 100
J. I. Case GmbH (Germany) 100

Tenneco Espana S.A. (Spain) 100%
Tenneco Oil Company of Ecuador, S.A. (Cayman Islands) 100
Tenneco Oil (Malaysia) S.A. (Cayman Islands) 100
Tenneco Petrole Gabon, S.A. (Cayman Islands) 100
Houston Oil & Minerals of Colombia, Inc. (Texas) 100
Houston Oil & Minerals of Dubai, Inc. (Texas) 100
Houston Oil & Minerals of The Netherlands, Inc. (Texas) 100
Houston Oil & Minerals of Tunisia, Inc. (Texas) 100
Houston Oil & Minerals U.K., Inc. (Texas)..... 100
LaTerre Colombia, S.A. (Cayman Islands)..... 100
Tenneco Oil of Gabon, Inc. (Texas) 100
Tenneco Oil & Minerals of UMM AL-QAIWAIN (Texas) 100
Houston Production Company (Texas) 100
Houston Royalty Company (Nevada) 100
Magrange Inc. (Texas) 100
Tenneco Oil Trading Company (Texas)..... 100
LaTerre Development Corp. (Delaware) 100
LaTerre Petroleum (U.K.), Inc. (Delaware).. 100
Mistal, Inc. (Delaware) 51
Mont Belvieu Land Company (Delaware) 100
Multistate Oil Properties, N.V. (Netherlands Antilles) 100
Operators, Inc. (Delaware) 100
Ship Channel Chemicals Company (Delaware).. 100
TENN-USS Chemicals Company (Texas General Partnership)
(Ship Channel Chemicals Company has 50% ownership as General Partner)
TENN-USS Chemicals Finance Corporation (Delaware) 50
(100% ownership in TENN-USS Chemicals Company, a Texas Partnership in which Ship Channel Chemicals Company owns 50%)
Tenneco LaTerre, Inc. (Delaware) 100
Tenneco Marine Services, Inc. (Delaware).. 100
Tenneco OCS Company, Inc. (Delaware) 100
Tenneco Oil Pipeline Company (Delaware) 100
Tenneco Retail Service Company (Delaware) .. 100

Tenneco Retail Service Company of Texas (Texas) 100%
Tenneco Storage Limited Partnership (Louisiana Limited Partnership)
(Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50% ownership as Limited Partner)
Tenneco Storage Capital Corporation (Delaware) 100
Viscosity Oil Company (Illinois) 100
Tenneco Oil Company of Nigeria (Delaware) 100
Tenneco Oil Company of Nigeria Unlimited (Nigeria) 50
Tenneco Polymers, Inc. (Delaware) 100
Tenneco Resins, Inc. (Delaware - in dissolution) 100
Tenneco Eastern Realty, Inc. (New Jersey).. 100
Tenneco Synfuels Company (Delaware) 100
Tennessee Overthrust Gas Company (Delaware).. 100
Tenngasco Corporation (Delaware) 100
Creole Gas Pipeline Corporation (Louisiana).. 100
Tenngasco Exchange Corporation (Delaware) 100
Tenngasco Gas Gathering Company (Delaware - in dissolution) 50
Tenngasco Gas Supply Company (Delaware) 100
HT Gathering Company (Texas) 50
Oasis Pipeline Company (Delaware) 20
Tenngasco Marketing Corporation (Delaware) 100
Walker Deutschland GmbH (Germany) 1
West Africa Corporation (Delaware) 100
Tenneco Oil Company of Nigeria Unlimited (Nigeria) 50
Tenneco Delta XII Gas Co. Inc. (Delaware) 100
Tenneco Energy Ltd. (Canada) 100
Tenneco Foreign Sales Corporation (U.S. Virgin Islands) 100
Tenneco Gas Pipeline Group, Inc. (Delaware) 100
Tenneco Gas Marketing Company (Delaware) 100
Tenneco Gas Transportation Company (Delaware)... 100
Tenneco Gas Services, Inc. (Delaware) 100
Tenneco International Inc. (Delaware) 100
A B Starla-Werken (Sweden) 100
J. I. Case Sweden A.B. (Sweden) 100
Sara Gretes Cafeteria AB (Sweden) 50
Tenneco Transicol AB (Sweden) 100
Walker Nord AB (Sweden) 100
Case Belgium Inc. (Delaware) 100
Case Poclain S.A. 14

Case Traktoren GmbH (Germany)	100%
Compania de Financiacion Case, S.A. (Spain)	100
Etablissement Robert Bellanger, S.A. (France)	100
Speedy Et Cie SNC (France) Etablissement Robert Bellanger, S.A. has 99% ownership and Speedy Inc. has 1% ownership)	
J. I. Case (Australia) Pty., Ltd. (Australia)	100
J. I. Case Credit Corporation of Australia Pty. Limited (Australia)	100
J. I. Case (Murray Bridge) Pty. Ltd. (Australia)	100
J. I. Case Norge A/S (Norway)	100
J. I. Case Operations (Europe) Inc. (Delaware)	100
J. I. Case S.A. (Spain)	100
J. I. Case South Africa (Pty.) Ltd. (South Africa)	100
J. I. Case Sweden Inc. (Delaware)	100
Marine Systems SpA (Italy)	100
Monroe Australia Pty. Limited (Australia)	100
Wylie Superannuation Pty. Ltd. (Australia)	100
Omni-Pac GmbH (Germany)	1
Omni-Pac S.A.R.L. (France)	97
Poclain do Brasil S.A. (Brazil)	100
P.P.M. Guindastes Hidraulicos S.A. (Brazil)	99
S.A. Paper Chemicals (Proprietary), Limited (South Africa)	60
S.A. Tenneco Belgium (J.I. Case-Monroe-Petro-Tex-Sperry-Marine) N.V. (Belgium)	100
International Harvester Company of Belgium N.V. (Belgium)	100
Societe Anonyme Industrielle des Resines (France)	100
Speedy Inc. (Delaware)	100
Speedy Et Cie SNC (France) (Speedy Inc. has 1% ownership and Etablissement Robert Bellanger, S.A. has 99% ownership)	
Sperry Marine SARL (France)	100
Tenneco Australia, Inc. (Delaware)	100
Tenneco Automotive Trading Company (Delaware)	100
Tenneco Deutschland Beteiligungs GmbH (Germany)	100
Case Vibromax GmbH (Germany)	100
Case Vibromax GmbH und Co. (Germany)	2

Vibromax Australia (Pty) Ltd. (Australia)	100%
Vibromax France SARL (France)	99
Vibromax SCI (France)	99
Monroe Auto Equipment Company GmbH (Germany)	100
Omni-Pac Ekco GmbH (Germany)	100
Omni-Pac GmbH (Germany)	99
Omni-Pac ApS (Denmark)	100
Omni-Pac A.B. (Sweden)	100
Omni-Pac S.A.R.L. (France)	3
Pit-Stop Auto Services GmbH (Germany)	100
Poclain GmbH (Germany)	100
Case Poclain GmbH & Co. (Germany)	2
Chance Gesellschaft Fuer Baumachinau MbH	100
Sperry Marine GmbH (Germany)	100
Vibromax France SARL (France)	1
Vibromax SCI (France)	1
Walker Deutschland GmbH (Germany)	99
Tenneco Egypt, Inc. (Delaware)	100
Tenneco Far East Exploration and Development Company (Delaware)	100
Tenneco Great Britain Limited (United Kingdom)	100
Tenneco Holdings B.V. (Netherlands)	100
Tenneco Nederland B.V. (Netherlands)	100
Case Poclain GmbH & Co. (Germany)	98
Chance Gesellschaft Fuer Baumachinau MbH (Germany)	100
Case Vibromax GmbH und Co. (Germany)	98
Vibromax Australia (Pty) Ltd. (Australia)	100
Sperry Marine B.V. (Netherlands)	100
Tenneco Transicol B.V. (Netherlands)	100
Tenneco Holdings Danmark A/S (Denmark)	100
Case Traktori Oy (Finland)	100
Finnwalker Oy (Finland)	100
J. I. Case A/S (Denmark)	100
Lydex A/S (Denmark)	100
Sperry Marine ApS (Denmark)	100
Sperry Marine A/S (Norway)	100
Tenneco International N.V. (Netherlands Antilles)	100
Tenneco International Trading Company (Delaware)	100
Tenneco Norge Inc. (Delaware)	100
Tenneco Norway Oil Company (Delaware)	100
Tenneco Offshore Netherlands Company (Delaware)	100

Tenneco Oil Company of the Bahamas (Delaware)	100%
Tenneco Oil Company of Colombia (Delaware)	100
Tenneco Oil Norway A/S (Norway)	100
Tenneco Oil Company of Trinidad (Delaware)	100
Tenneco Oil Cote d'Ivoire, Inc. (Delaware)	100
Tenneco United Kingdom Holdings Limited (Delaware)	100
J. I. Case Europe Limited (Delaware)	100
Case Credit Limited (United Kingdom)	100
International Harvester Company of Great Britain Limited (United Kingdom)	100
J. I. Case Europe Limited (a UK Company)	100
Omni-Pac U.K. Limited (United Kingdom)	100
Hartmann Fibre Limited (United Kingdom)	100
Tenneco Europe Limited Delaware)	100
Tenneco International Finance Limited (United Kingdom)	100
Case Credits Limited (United Kingdom)	100
Sperry Marine Limited (United Kingdom)	1
Tenneco International Finance BV (Netherlands)	100
Tenneco International Holdings Limited (United Kingdom)	100
Albright & Wilson Limited (United Kingdom)	100
ACC (Fertilisers) Ltd. (United Kingdom)	100
FCL Crop Protection, Ltd. (United Kingdom)	100
Robt. Stephenson & Son, Ltd. (United Kingdom)	100
The Farmers Co., Ltd. (United Kingdom)	100
Albright & Wilson A.B. (Sweden)	100
Albright & Wilson A/S (Norway)	100
Albright & Wilson Asia (H.K.) Limited (Hong Kong)	100
Albright & Wilson Pte Limited (Singapore)	100
Albright & Wilson Asia Taiwan Limited (Taiwan)	100
Albright & Wilson Asia Trading (Malaysia) Sdn Bhd (Malaysia)	100
Albright & Wilson ESP Trustees Ltd. (United Kingdom)	100

Albright & Wilson Executive Pension Trustees, Ltd. (United Kingdom)	100%
Albright & Wilson GmbH (Austria)	100
Albright & Wilson Intertrade Ltd. (United Kingdom)	100
Albright Wilson Chemicals (PTY), Ltd. (Australia)	100
Albright & Wilson (Australia) Limited (Australia)	57
Albright & Wilson New Zealand Limited (New Zealand)	100
Albright & Wilson (Langley) Ltd. (United Kingdom)	100
Albright & Wilson (Malaysia) SDN. BHD. (Malaysia)	100
Albright & Wilson (Marchon) Pte. Limited (Singapore)	100
Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom)	100
Albright & Wilson (Mfg.) Ltd. (United Kingdom)	100
Albright & Wilson Oils SDN BHD (Malaysia)	100
Albright & Wilson Overseas Ltd. (United Kingdom)	100
Akulu Marchon (PTY) Ltd. (South Africa)	50
Akulu Chemicals Coast (PTY) Limited (South Africa)	100
Akulu Chemicals (PTY) Ltd. (South Africa)	100
Albright & Wilson Aps (Denmark)	100
Albright & Wilson BV (Netherlands)	100
Albright & Wilson GmbH (Germany)	100
Albright & Wilson International Finance BV (Netherlands)	100
Albright & Wilson Ireland Ltd. (Eire)	100
Albright & Wilson Northern Ireland, Ltd. (United Kingdom)	100
Ibex Ltd. (Ireland)	100
Thawpit (Ireland) Ltd. (Ireland)	100

Albright & Wilson SpA (Italy)	100%
Marchon Espanola S.A. (Spain)	100
Marchon France S.A. (France)	100
Marchon Hellas Ltd. (Greece)	100
Marchon Italiana SpA (Italy)	100
Marchon Sud SpA (Italy)	100
Polyphosphates Inc. (Philippines)	40
Albright & Wilson Pension Investments Ltd. (England)	100
Albright & Wilson Produtos Quimicos Ltda. (Brazil)	100
Albright & Wilson Resins and Organics Limited (United Kingdom)	100
Albright & Wilson (Sandwell) Ltd. (United Kingdom)	100
E. P. Potter & Co. Ltd. (United Kingdom)	100
Albright & Wilson Staff Pension Trustees Ltd. (United Kingdom)	100
Albright & Wilson Works Pension Trustees Ltd. (United Kingdom)	100
Albright & Wilson Dentifrice Phosphates Sdn. Bhd. (Malaysia)	100
Albright, Morarji and Pandit Limited (India)	39.9
Astoria Shipping & Transport Co., Ltd. (United Kingdom)	100
Butler (1843) Ltd. (United Kingdom)	50
(50% owned by Petrofina (U.K.) Limited a non-Tenneco company	
Arndale Fuels Ltd. (United Kingdom)	100
Butler Oil Products Ltd. (United Kingdom)	100
Croft Oils Limited (United Kingdom)	100
Elston Oils Limited (United Kingdom)	100
Gough Oils Limited (United Kingdom)	100
John Oils Limited (United Kingdom)	100

Cambray Ltd. (United Kingdom)	100%
Clifford Christopherson & Co., Ltd. (United Kingdom)	100
Cumbria Trading Co., Ltd. (United Kingdom)	100
Detergent Chemicals Limited (United Kingdom)	100
Electropol Ltd. (United Kingdom)	100
General Phosphates Co. Ltd. (United Kingdom)	100%
Mallison Feeds, Ltd. (United Kingdom)	100
Marchon Products, Ltd. (United Kingdom)	100
Mays Chemical Manure Co., Ltd. (United Kingdom)	100
Mortimer Investment Co. Limited (United Kingdom)	100
Proban Ltd. (United Kingdom)	100
The Scottish Chemical Co., Ltd. (United Kingdom)	100
Solway Chemicals, Ltd. (United Kingdom)	100
Tenneco Malros Ltd. (United Kingdom)	100
Tenneco Organics Ltd. (United Kingdom)	100
Compass Chemicals, Ltd. (United Kingdom)	100
Thomas Tyrer & Co. Ltd. (United Kingdom)	100
Case-Poclain Limited (United Kingdom)	100
David Brown Tractors Limited (United Kingdom)	100
David Brown Tractors (Belfast) Ltd. (United Kingdom)	100
David Brown Tractors (Ireland) Ltd. (Ireland)	100
David Brown Tractors (Retail) Ltd. (United Kingdom)	100
A. M. Exports Limited (United Kingdom)	100
Poclain Limited (United Kingdom)	100
Tractorwork, Limited (United Kingdom)	100
Harmo Industries Ltd. (United Kingdom)	100
Birmingham Filters Limited (United Kingdom)	100

Brames Limited (United Kingdom)	100%
D. P. Miller & Sons Limited (United Kingdom	100
Harmo Pressings Limited (United Kingdom)	100
Harmo Steel Co. Limited (United Kingdom)	100
Harmo Tubes Limited (United Kingdom)	100
F. Mould Limited (United Kingdom)	100
F. Mould (Silencers) Limited (United Kingdom)	100
The Harmo Engineering Co. Limited (United Kingdom)	100
J. W. Hartley (Motor Trade) Limited (United Kingdom)	100
Fisher & Mould Limited (United Kingdom)	100
Harmo Auto Services (Export) Limited (United Kingdom)	100
Harmo Auto Services Limited (United Kingdom)	100
Harmo Export Ltd. (United Kingdom)	100
Harmo Filters Limited (United Kingdom)	100
Harmo Technical Development Limited (United Kingdom)	100
Steering & Suspension Limited (United Kingdom)	100
Karobes Limited (United Kingdom)	100
Midland Trim & Equipment Ltd. (United Kingdom)	100
Houston Data Venture (U.K.) Limited (United Kingdom - in dissolution)	100
J. I. Case Company Limited (United Kingdom)	100
Monroe Auto Equipment U.K. Limited (United Kingdom)	100
Sperry Marine Limited (United Kingdom)	99
Tenneco - Walker (U.K.) Limited (United Kingdom)	100
Tenneco West Limited (United Kingdom)	100
Thompson and Stammers (Dunmow) Limited (United Kingdom) (in liquidation)	100
Tenneco United Kingdom, Inc. (Delaware)	100

Tractorwork Iberica, Inc. (Delaware)	100%
Universaltrac Beteiligungs GmbH (Germany)	100
Intertractor Viehmann GmbH & Co. (Germany)	50
Intertractor A.G. (Switzerland)	100
Intertractor America Corporation (Delaware)	100
Intertractor G.B. Ltd. (United Kingdom)	100
Intertractor Italiana S.R.L. (Italy)	100
Intertractor S.A.	100
Walker Europe, Inc. (Delaware)	100
Walker Norge A/S (Norway)	100
Tenneco LNG Inc. (Delaware)	100
Tenneco Norway LNG Inc. (Delaware)	100
Tenneco Realty, Inc. (Delaware)	100
First National Services, Inc. (Delaware)	100
Inmobiliaria Belgrado, S.A. (Mexico)	100
Ten Ten Travis Corporation (Delaware)	100
Tennchase, Inc. (Texas)	100
Tennessee Gas Building Corporation (Delaware)	100
TRI Realty, Inc. (Texas)	100
Tenneco Shale Oil Company (Delaware)	100
Tenneco SNG Inc. (Delaware)	100
Tenneco Trinidad LNG, Inc. (Delaware)	100
Tenneco Turkiye, Inc. (Delaware)	100
Tennessee Gas Marketing Company (Delaware)	100
Tennessee Gas Transmission Company (Delaware)	100
Tennessee Iroquois Gas Company (Delaware)	100
Tennessee Niagara Gas Company (Delaware)	100
Tennessee Ozark Gas Company (Delaware)	100
Tennessee Storage Company (Delaware)	100
Tennessee Trailblazer Gas Company (Delaware)	100
Walker Manufacturing Company (Delaware)	100
Walker Marketing Corporation (Wisconsin)	100

No. 88-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TENNECO OIL COMPANY,

Petitioner

v.

KERN OIL & REFINING CO.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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October 15, 1988

QUESTIONS PRESENTED

Jurisdiction to Enter Findings of Fact and Conclusions of Law

1. Do the particular facts of this case except it from the general rule that the filing of a notice of appeal divests the district court of jurisdiction?

2. Does the Ninth Circuit's decision excepting this case from that general rule conflict with the holding of any other Court of Appeals?

Denial of Pretrial Motion for Disclosure

1. Should this Court consider Tenneco's First Amendment argument when that issue was not raised in the district court on Tenneco's pretrial motion or argued in the Court of Appeals? Should this Court consider Tenneco's Rule 26 argument when that issue was not raised in the Court of Appeals?

2. Can the decision of the Ninth Circuit create a conflict on issues it does not address?

3. Should this Court review issues that are irrelevant to the outcome of this case?

4. Do the particular facts of the pretrial disclosure issue in this case present a question of general applicability warranting review by this Court?

RULE 28.1 STATEMENT

Respondent Kern Oil & Refining Co. has no subsidiaries that are not wholly owned and is not a subsidiary or affiliate of any other company.

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No. 88-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TENNECO OIL COMPANY,

Petitioner

v.

KERN OIL & REFINING CO.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kern Oil & Refining Co. ("Kern") respectfully urges the Court to deny the Petition for Certiorari filed by Tenneco Oil Company ("Tenneco"). The Petition presents issues not preserved in the courts below, presents no conflicts among the Circuits, and presents no issues of general application or national importance. The case involves substantive and procedural facts not likely to recur, and was correctly and fairly decided below. Review by this Court is not warranted.

STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

Tenneco's Petition neither truthfully nor fully sets forth the pertinent events in either the courts below or in the Department of Energy. This case turns on its facts, and Tenneco's inaccurate and incomplete presentation of the material facts below is in itself reason to deny the Petition. Sup. Ct. Rule 21.5. The true facts tell quite a different story and demonstrate that this is not a case warranting the exercise of this Court's certiorari jurisdiction.

Briefly stated, the material facts regarding the district court's entry of its Findings of Facts and Conclusions of Law are as follows: After the district court had ruled on both liability and damages, Kern, at the court's direction, prepared a proposed order and judgment and proposed findings of fact and conclusions of law. Tenneco filed an exhaustive, *120-page opposition* to the proposed findings and conclusions. Three weeks later, the district court signed the Findings and Conclusions, making only minor corrections and *no substantive changes* except one favoring Tenneco. *The district court signed both the Findings and Conclusions and the Order and Judgment on the same day—October 10, 1986.* Due to what can only be *clerical error*, the Order and Judgment was filed on November 3 and entered on November 5, but the Findings and Conclusions did not find their way into the record until November 24, after having been filed on November 21. Tenneco filed its Notice of Appeal on November 21. *The appeal was docketed in the Ninth Circuit on December 12*, three weeks after the Findings and Conclusions had been entered.

Tenneco's presentation of the facts regarding the district court's handling of the disclosure of discovery documents deceptively mixes together the events and the legal positions taken by the parties with respect to three different matters: (1) Tenneco's April 1985 pretrial motion for disclosure, which was *denied*; (2) the January 1986 trial closure, *to which Tenneco did not object*; and (3) Tenneco's July 1986 post-trial motion to unseal the trial record, which was *granted*. Obviously, Tenneco's grievance here can relate only to the district court's denial of its pretrial motion. Review, however, can properly be sought only of the legal issues

raised below. Contrary to the implications of the Petition, Tenneco did not raise the First Amendment issue in the district court until its successful *post-trial* motion to unseal the trial record, and Tenneco did not argue either the First Amendment or Rule 26 of the Federal Rules of Civil Procedure in the Ninth Circuit. Consequently, the Ninth Circuit did not rule on these issues.

Tenneco—itself having been found liable below for fraud (as well as for intentional violation of federal regulations and breach of contract)—tries in its Petition to portray Kern as a malefactor that has "defrauded" the Department of Energy and thus the American public. As Tenneco well knows, Kern did no such thing. It is particularly offensive that Tenneco, in its second "Question Presented," says that the DOE "found" Tenneco's allegations of fraud "to be true." *The DOE does not accuse Kern of fraud and has specifically disclaimed any such accusation.* Characterization aside, the administrative complaint against Kern, which Tenneco implies is a final agency decision, is based on a legal theory that was conceived by the DOE's enforcement arm long after the period at issue here and is closely related to a DOE legal theory that has been rejected on constitutional and other grounds in its first and only interpretation beyond the agency level. In fact, Kern followed the applicable regulations and did not "cheat" the Department of Energy or anyone else.

Tenneco has doggedly pursued the "fraud" issue in the district court, the DOE, the Ninth Circuit Court of Appeals, the Temporary Emergency Court of Appeals, and now here. Tenneco has never had a legitimate reason to do so—it was not a party to the questioned transactions, and their validity can have no effect on the damages Tenneco must pay in this case. Tenneco's actions in this respect are, and always have been, brought for reasons of retaliation and harassment, not out of any genuine sense of public responsibility.

II. STATEMENT OF FACTS

The district court found Tenneco liable for willful violation of federal regulations, intentional breach of contract, and fraud and misrepresentation, all arising out of Tenneco's conduct from mid-1978 through the end of 1980 in refusing to honor its obligations

to supply Kern with 2.8 million barrels of valuable high-gravity "light" crude oil from Tenneco's Yowlumne, California field. The court awarded Kern $16,761,639 in lost profits damages plus equitable prejudgment interest and (pursuant to the applicable state law) attorneys' fees on its contract claims. Pet. App. 50a, 53a.[1]

Kern's damage claim sought recovery of the profits it would have made refining 1.8 million barrels of the high value Yowlumne crude if Tenneco had met its regulatory and contractual supply obligations. In calculating such profits for its fiscal year April 1979-March 1980, Kern assumed that it would not have had to purchase "entitlements" to refine that portion of the Yowlumne crude which was price-controlled because the DOE declared Kern eligible for $26 million in "exception relief."[2]

Discovery in this litigation was conducted pursuant to a negotiated protective order which provided, among other things, that discovery materials would "not be disclosed for any purpose other than in connection with the litigation of these cases." Pet. App. 84a. In early April 1985, eight months before trial, Tenneco announced to Kern that its review of documents that Kern had produced in discovery led it to believe that Kern, in unrelated transactions not involving Tenneco, had "cheated" the entitlements program out of $28 million. Tenneco claimed to be interested in these transactions because, Tenneco said, if the DOE knew of these transactions, it would revoke the exception relief on which Kern relied to compute its damage claim in this case. Tenneco asked Kern to consent to Tenneco's disclosure of those documents to the DOE so it could seek revocation of Kern's exception relief, threatened to bring a separate federal court action against Kern, and presented Kern with a demand that Kern pay $28 million to *Tenneco*, which was not involved in the questioned transactions,

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[1] The abbreviation "Pet. App." as used herein refers to the Appendices to Tenneco's Petition. The term "Opp. App." refers to the Appendices to this Brief in Opposition.

[2] Entitlements, designed to even out the cost of crude to refiners, were essentially surcharges for refining price-controlled crude oil; exception relief, designed to aid small refiners whose profits had been considerably reduced because of the cost of crude, excused a refiner from having to purchase entitlements up to the amount of eligibility. The entitlements program ended in 1981.

was not harmed in any way by them, and had no legitimate basis for its monetary demand. Ct. App. ER 652-53.[3]

After investigating the facts and the law, Kern declined to consent to disclosure or to pay any money to Tenneco, denying that it had done anything unlawful and pointing to DOE precedent that showed Kern's third party dealings could have no effect on this lawsuit as well as to a satisfactory 1981 DOE entitlements compliance audit of Kern in which the DOE had reviewed many (concededly, not all) of the documents Tenneco sought to disclose. Nevertheless, on April 19, 1985 Tenneco filed a motion to lift the protective order so it could turn the discovery documents over to the DOE. In its motion papers (and in every subsequent paper it filed on the disclosure issue until DOE action proved Tenneco wrong) Tenneco claimed it needed disclosure because the DOE supposedly would revoke the exception relief relied upon by Kern in its damage calculation. Neither at this nor at any other time until five and a half months after the trial had ended, in its *successful* July 1986 post-trial motion to unseal the trial record, did Tenneco assert any First Amendment right.

Kern opposed the pretrial disclosure motion on the grounds, *inter alia*, that Kern had committed no wrong, that Kern's transactions with third parties could have no effect on Kern's damage claim against Tenneco as shown by DOE precedent, and that Tenneco's motion and earlier unjustified demand abused the discovery process, violated 10 C.F.R. § 210.61 (prohibiting retaliatory actions in the context of the federal regulatory program) and violated Rule 11 of the Federal Rules of Civil Procedure.[4]

Kern did not argue "that Tenneco should be bound by the umbrella protective order even in the absence of good cause,"

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[3] "Ct. App. ER" refers to the Excerpts of Record filed with the Ninth Circuit Court of Appeals in this case.

[4] Tenneco's motivation appears to be rooted in Kern's prior successful efforts to redress wrongs. As a result of a 1979 DOE petition filed by Kern complaining about Tenneco's violations of the crude oil allocation regulations, the DOE issued a Proposed Remedial Order to Tenneco, which was resolved in 1981 by Tenneco's entry into a Consent Decree under which Tenneco paid $15 million to the DOE. In July 1984 Kern obtained a $3.6 million judgment against Tenneco in the district court for overcharges in sales of crude oil. In September 1984 the district court in that overcharge case dismissed Tenneco's counterclaims; in December 1984 the district court in this case dismissed identical Tenneco counterclaims on *res judicata* grounds.

Petition at 4. Nor did the district court shift the burden to Tenneco on the disclosure issue. *Id.* at 23-26. The district court's May 15, 1985 order directed Kern to provide a showing of good cause why the documents should be protected from disclosure. Kern argued that good cause was established by a line of directly applicable decisions led by *GAF Corporation v. Eastman Kodak Company*, 415 F. Supp. 129 (S.D.N.Y. 1976). Ct. App. ER 715. Those cases hold that a party which has received documents in the course of discovery in a lawsuit with the understanding that they were to be used solely for that litigation cannot voluntarily disclose those documents to a government agency for purposes of the agency's investigation of the party which produced the discovery. Kern also argued that Tenneco's abuse of the discovery process and bad faith in bringing the motion and in attempting to extort money from Kern was good cause to deny the motion.

As shown by the district court's September 6, 1985 and September 25, 1986 Orders, Pet. App. 24a, 46a, the district court interpreted the "good cause" language of Fed. R. Civ. P. 26(c) as meaning "confidential." Finding that the documents were not confidential, it therefore found that Kern had not shown "good cause." However, the court also said it fully agreed with the *GAF* line of cases, Pet. App. 26a, and, holding Tenneco bound to the terms of its agreement, *id.* 26a-27a, denied Tenneco's pretrial motion for disclosure, *id.* 28a-30a.

The district court permitted Tenneco to present at trial its evidence purporting to establish that Kern violated DOE regulations in the third-party transactions and that that conduct somehow affected this case[5]. When Tenneco indicated that it was about to present such evidence, Kern asked that the courtroom be closed and the trial record sealed. The district court granted that request. Tenneco seems to assign this as error, Petition at (i), 4-6, 16, 25-26, 28, but omits to note that *when Kern made its request, Tenneco's counsel stood mute* and made no objection whatsoever to the closure. Pet. App. 46a.

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[5] The district court precluded the testimony of one Tenneco witness pursuant to local rules because Tenneco had neither identified that person as a witness on a matter which had been "in issue . . . from day one" nor made him available for deposition.

Tenneco argued at trial its by then familiar refrain that the DOE, if it knew of the third-party dealings, would revoke Kern's 1980 exception relief. Kern responded as before—that it had committed no violation and that in any event its third-party transactions could have no bearing on the amount of Tenneco's liability in the case before the court. Kern referred the district court to *USA Petroleum Company*, 12 DOE ¶ 82,503 (1984), a DOE decision showing that even if it believed Kern had acted improperly, it would not revoke Kern's exception relief (although it might take remedial action). The district court found not only that Kern had done nothing unlawful, but also that even if the transactions had been wrongful, the DOE would not revoke Kern's exception relief. Pet. App. 76a.

Tenneco also argued in the courts below that the evidence showed it would not have been in Kern's economic interest to refine the Yowlumne crude. It reargues that factual issue here, claiming that "the cost of entitlements increased the cost of oil to Kern so substantially that Kern would not have rationally purchased and refined" the Yowlumne crude. Petition at 3. Tenneco's expert, however, conceded on cross-examination that it would have been profitable for Kern to refine the light high-gravity Yowlumne crude *even if Kern had to pay associated entitlements costs.* RT 14C:8. Kern also showed that it had more than enough unused exception relief eligibility to cover any entitlements obligations associated with the nondelivered Tenneco crude *plus* any entitlements costs arguably owed for the crude involved in the questioned third-party transactions, RT 16B:125-28, RT 16C:3-5, and Tenneco's expert admitted that if Kern's entitlement purchase obligations would not exceed the amount of Kern's exception relief eligibility, there would be no effect on Kern's damage claim, RT 14C:25. Tenneco's other expert, who attempted to demonstrate that Kern's refinery was incapable of processing the Yowlumne crude and that it was Kern's practice to sell crude of quality comparable to the Yowlumne crude, was found by the district court to have distorted the facts and given misleading testimony. Pet. App. 41a-42a, 54a, 62a, 75a. As the Ninth Circuit later described it, there was a "great deal" of evidence before the district court, most of it highly technical,

showing that Kern would "rationally" have refined the Yowlumne crude.[6]

Trial of the bifurcated damages phase ended on January 17, 1986; post-trial briefing and closing arguments were concluded by February 12. The district court then took the question of damages under submission. Although Tenneco's Petition implies that it moved immediately after trial to unseal the trial record and that it did so more than once, Petition at 5, Tenneco did not in fact bring its motion until July 2, 1986, almost six months after closing arguments. As noted, that motion was successful. In that post-trial motion Tenneco *for the first time* asserted a First Amendment right to petition the government.

On September 25, 1986, the district court issued its order allowing disclosure of the trial transcript and those documents admitted as trial exhibits but delaying its date of effectiveness to allow Kern to take what turned out to be an unsuccessful appeal of the order. On October 8, the day the order became effective, Tenneco ran to the DOE's Office of Hearing and Appeals ("OHA") with the documents, the trial record and a "Petition for Special Redress." Tenneco's Petition here fails to inform this Court that *Tenneco's DOE petition specifically sought revocation of Kern's 1980 exception relief*, Ct. App. ER 4451, and that, as the district court and Kern had correctly predicted, *OHA rejected Tenneco's petition*, Ct. App. ER 4575. Declaring that a remedial proceeding was the more appropriate proceeding in which to evaluate whether Kern had violated the regulations, and noting the "attenuated relationship" between Tenneco's grievance and Kern's alleged violations, OHA refused to reopen the question of Kern's 1980 exception relief. *Id.*

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[6] The evidence included detailed documentation and testimony as to, *e.g.*, crude oil quality and price category classification; entitlements costs; transportation costs; crude oil sales and exchanges; inventory turnovers; chemical engineering matters regarding the equipment at Kern's refinery and whether it could physically process high API gravity crude oil; operating costs; what products, in what percentage, and of what value could be refined from particular mixtures of crude oil; market prices for refined products; and crude oil accounting. The district court found that "every element of Kern's damage claim [was] thoroughly documented in the evidence," and that it would have been "sound business practice" for Kern to refine the Tenneco Yowlumne crude. Pet. App. 42a, 74a, 62a.

Instead, on March 31, 1987, DOE's enforcement arm, the Economic Regulatory Administration ("ERA"), issued a Proposed Remedial Order ("PRO") seeking a $25 million refund, plus interest, from Kern. A PRO, as Tenneco well knows, is nothing more than an administrative complaint. The PRO issued to Kern is based on a legal theory that ERA developed well after the period at issue here and which is closely related to a DOE theory that was rejected the only time it has been addressed beyond the agency level. Magistrate's Report and Recommendation, *Canal Refining Co. v. United States Department of Energy*, Case No. 87-C-294-E (N.D. Okla.) (April 26, 1988).

The outcome of the DOE refund proceedings commenced by the issuance of the PRO can have no effect whatsoever on this lawsuit, and, even if the DOE should order Kern to refund any sums and that order were affirmed on appeal, Tenneco would not be entitled to any portion of those sums. Tenneco never had any legitimate reason for pursuing this issue—not in the district court, not in the DOE, not in the Ninth Circuit, not in the Temporary Emergency Court of Appeals,[7] and not here. *See* n.4, *supra*.

Meanwhile, on August 26, 1986, the district court issued its Memorandum of Decision awarding Kern its lost profit damages. (The court had issued an oral ruling on liability issues at the close of that phase of the trial.) In the Memorandum of Decision, the district court stated that it did not purport to address therein all issues that had been raised, and directed Kern to prepare a proposed order and judgment and proposed findings of fact and conclusions of law "on all material issues involved." Pet. App. 41a, 45a. Kern, on September 5, accordingly submitted a proposed order and judgment and findings and conclusions, and—another fact conspicuously omitted from the Tenneco Petition—Tenneco, on September 22, filed a *120 page objection* to the findings and conclusions proposed by Kern. Ct. App. ER 4430. The district court's next action—again inexcusably not mentioned in the Tenneco Petition—

[7] Appeal in this case was bifurcated due to TECA's exclusive appellate jurisdiction over Kern's regulatory cause of action against Tenneco. TECA stayed proceedings there pending the decision of the Ninth Circuit on Kern's breach of contract and fraud claims. Tenneco, dissatisfied with the Ninth Circuit's decision on disclosure, has raised precisely the same arguments in TECA that it raised in the Ninth Circuit.

was to sign *both* the Order and Judgment *and* the Findings and Conclusions three weeks later, on October 10. Pet. App. 52a, 80a.

As the Ninth Circuit found, it was clearly the intent of the district court that both documents be filed at the same time. Pet. App. 7a. However, because of what can only be clerical oversight, the Order and Judgment was filed on November 3 and entered on November 5, but the Findings and Conclusions were not filed until November 21 or entered until November 24. Between November 5, when the Order and Judgment was entered, and November 21, when Tenneco filed its notice of appeal, Tenneco did not inquire of the district court regarding the status of the Findings and Conclusions, did not bring a Rule 59(b) motion for a new trial, and did not ask for an extension of time to bring a Rule 52 or 59 motion or to bring its appeal. Indeed, Tenneco did not even wait the allowable 30 days before filing its notice of appeal. Tenneco argued in the Ninth Circuit that it had been deprived of the opportunity to move for a new trial or for amended Findings and Conclusions or an amended judgment, but the Ninth Circuit, "unpersuaded" by Tenneco's arguments, found that Tenneco's non-action showed it "was unconcerned about the deadlines for a Rule 52 or 59 motion and suffered no harm by the late filing." Pet. App. 7a.

As indicated, Tenneco filed its Notice of Appeal on November 21, the same day the Findings and Conclusions were filed. *However, the appeal was not docketed in the Ninth Circuit until December 12*, a highly material fact that Tenneco's Petition ignores. The district court thus entered its Findings and Conclusions well within the period allowed under Fed. R. Civ. P. 60(a) for correcting clerical mistakes arising from oversight or omission. Opp. App. 13a.

Apart from one change adverse to Kern, the Findings and Conclusions as signed by the district court contain no substantive changes from the findings and conclusions which Kern had proposed and to which Tenneco had so strenuously objected. As Tenneco itself stated in its Ninth Circuit opening brief,

> Out of 35 pages of text, the district court made only 5 changes. The court lined out the word "proposed" from the caption of the document; changed the word "large" to "larger" in Finding No. 5; altered the structure of a sentence in Finding No. 12;

corrected the spelling of the word "laches" in Conclusion No. 37; and drew an "x" through Conclusion No. 60.[8]

Tenneco appealed a great many issues to the Ninth Circuit, among them the district court's jurisdiction to enter the Findings and Conclusions and the effect on the damage award of the district court's denial of Tenneco's pretrial disclosure motion. The Court of Appeals, in an opinion by Judge Sneed, affirmed on all counts. In affirming the jurisdiction of the district court to enter the Findings and Conclusions, the Court of Appeals distinguished this case on its particular facts while validating its earlier decision in *Sumida v. Yunen*, 409 F.2d 654 (9th Cir. 1969), a case on all fours with the general rule set forth in the decisions of other circuits Tenneco relies on here. Pet. App. 7a. The panel noted Tenneco's lengthy opposition to the proposed findings and conclusions, the fact that "the district court did not attempt to move the target" (*i.e.*, there were no substantive changes) and the district court's evident intent that the Findings and Conclusions be filed at the same time as the Order and Judgment. *Id.*

On the disclosure issue, Tenneco stated the question and captioned those portions of its Ninth Circuit briefs in terms of First Amendment rights and occasionally used the words "First Amendment," but it *never discussed* this constitutional issue, Opp. App. 1a-12a,[9] a fact that did not escape the notice of the Ninth Circuit panel. Pet. App. 16a n.10. Nor did Tenneco even mention Fed. R. Civ. P. 26 or "good cause." It did not cite a single one of the thirty-plus authorities it relies on here. Instead, Tenneco argued to the Ninth Circuit that the district court's damage award was necessarily erroneous. Tenneco claimed that the DOE would have revoked Kern's exception relief and, selectively quoting excerpts from the PRO and from Kern's Statement of Objections to the PRO, asserted that Kern either would not have refined the Yowlumne crude or would have evaded entitlements obligations on that crude.[10]

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[8] Proposed Conclusion No. 60 had provided for continuing confidentiality of trial testimony, exhibits and arguments wholly derived from discovery.

[9] Because Tenneco's Ninth Circuit briefs are so lengthy, Kern appends hereto only those portions in which Tenneco addressed the disclosure issue.

[10] As noted, *supra*, the identical arguments have now been made to TECA. Kern's position before TECA is that this issue is not properly before it, for many reasons.

Tenneco submitted Kern's DOE Statement of Objections to the Ninth Circuit after Kern had already submitted its Ninth Circuit appellee's brief. Kern therefore did not have the opportunity to brief in the Ninth Circuit Tenneco's allegations of inconsistent positions. We do so here. Contrary to Tenneco's statement, Petition at 8, Kern *never* said to the DOE "that it would not have refined any additional price controlled Tenneco oil." Kern's statements in the DOE proceedings are wholly consistent with its statements and the evidence at trial; Kern told the DOE that the crude oil Kern would have sold and not refined was "primarily low-gravity," "severely disadvantaged" price controlled crude oil—heavy crude of considerably less value than the "light" high-gravity, high quality Tenneco Yowlumne crude at issue in this case. Kern never said anything about Tenneco oil in its DOE Statement of Objections.[11]

The Ninth Circuit, affirming the district court's decision on the pretrial disclosure issue, stated:

> Tenneco argues that because the district court did not allow it to reveal these documents to the DOE until after the trial, the court based its award of damages on incorrect assumptions as to Kern's rights [sic] to purchase entitlements. The short answer to this argument is that the district court allowed Tenneco to produce at trial the evidence it later submitted to the DOE. Kern argued at trial that even if the Department of Energy held that Kern had acted unlawfully it would not revoke Kern's unused exception relief eligibility, which excused Kern from having to purchase entitlements for the Yowlumne oil. The district court therefore had this dispute directly before it. We cannot say that its resolution of the dispute was unsupported by the evidence.

Pet. App. 16a. It also noted Tenneco's arguments about Kern's post-trial statements to the DOE and, assuming that Kern's statements had been inconsistent, nonetheless upheld the district

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[11] Kern does not deny that some of the crude involved in the questioned third party transactions was Yowlumne. The district court had before it Tenneco's evidence that such was the case, but nonetheless reached its conclusion as finder of fact that Kern would have refined the 1.8 million barrels of withheld Yowlumne crude claimed in Kern's damage calculation.

court's decision, pointing to the "great deal of evidence [before the district court] on how Kern would have disposed of the oil it did not receive." *Id.* 17a.

On March 21, 1988 Tenneco petitioned the Ninth Circuit for rehearing and suggested rehearing en banc. On May 19, the Ninth Circuit denied rehearing and, with no judges requesting a vote, rejected the suggestion for en banc reconsideration. *Id.* 22a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Tenneco Question No. 1: Jurisdiction to Enter Findings of Fact and Conclusions of Law.

A. The Circumstances Surrounding the Entry of the Findings and Conclusions Here Are Unusual and Not Likely to Recur.

A unique confluence of facts surrounds the district court's Findings and Conclusions. As noted, Tenneco's Petition omits important parts of the story: (1) that it filed an exhaustive 120-page opposition to the proposed findings and conclusions; (2) that the Findings and Conclusions, as entered, made no substantive changes from the proposed findings and conclusions to which Tenneco had so strenuously objected; (3) that the district court signed both the Order and Judgment and the Findings and Conclusions on the same day, intending, as the Ninth Circuit found, that they be filed simultaneously; and (4) that the Findings and Conclusions were entered three weeks before the appeal was docketed. While we will never know exactly what happened to the Findings and Conclusions in the in-boxes and out-boxes of the district court between October 10, when they were signed, and November 21, when they were filed, it seems clear that some sort of clerical oversight caused the delay. Tenneco took no steps to move for a new trial or an amended judgment or to protect its rights to bring a motion under Rule 52(b); as the Ninth Circuit found, Tenneco was "unconcerned about the deadlines for [such] motions and suffered no harm by the late filing." Pet. App. 7a. The chances that such a combination of circumstances would ever again converge in one case are highly remote.

B. On the Facts of This Case, the District Court Had Jurisdiction to Enter the Findings and Conclusions, and There Is No Conflict of Circuits.

The Ninth Circuit, recognizing the unique factual situation before it, accepted and relied on the district court's Findings and Conclusions. It observed that a notice of appeal "usually divests the district court of jurisdiction," Pet. App. 6a, but distinguished this case from that general rule. This case and those which Tenneco argues are "in error," Petition at 12-13, demonstrate exceptions to that general rule. The conflict of Circuits contrived by Tenneco is nothing more than the difference between the general rule and its exceptions, both of which are uniformly applied in the various United States Courts of Appeals.

The general rule that jurisdiction is transferred upon the filing of a notice of appeal remains the rule in the Ninth Circuit as elsewhere. *See, e.g., McClatchy Newpapers v. Central Valley Typographical Union*, 686 F. 2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982); *Davis v. United States*, 667 F. 2d 822, 824 (9th Cir. 1982); *Sumida v. Yunen*, 409 F.2d 654 (9th Cir. 1969), *cert. denied*, 405 U.S. 964 (1972). Tenneco admits, as it must, that there are exceptions to that general rule, including jurisdiction to act in aid of the appeal and to act under specific authority such as Fed. R. Civ. P. 60(a), which authorizes the district court to correct clerical mistakes until the time the appeal is docketed. Petition at 9. *See, e.g., Henry v. Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986); *Ced's, Inc. v. United States Environmental Protection Agency*, 745 F.2d 1092, 1095 (7th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F. 2d 298, 299 (5th Cir. 1984), all cases relied upon here by Tenneco that recognize the existence of these exceptions. Tenneco argues that the district court in this case "crafted" a "new" exception. Petition at 9, 10. To the contrary, this case falls squarely within the acknowledged exception provided by Rule 60(a) and presents other facts taking it outside of the general rule.

Rule 60(a) specifically authorizes the district court to correct clerical errors arising from oversight or omission at any time *until the appeal is docketed* in the Court of Appeals, and thereafter with

the permission of the appellate court. Opp. App. 13a. The district court's Findings of Fact and Conclusions of Law here were filed on November 21, 1986, and entered on November 24. Tenneco's appeal was filed on November 21, but was not docketed in the Ninth Circuit until three weeks later, on December 12. "Filing is not the same as docketing," *United States v. Statchuk*, 682 F.2d 466, 467 (4th Cir. 1982), and the filing of a notice of appeal "does not divest the district court of power to make corrections under Rule 60(a)," *id.* at 467-68. The district court thus retained jurisdiction to correct its clerical mistake.[12] There was no possibility here that the entry could "throw off the appellate timetable," Petition at 14, and no "attempt to assert jurisdiction simultaneously," *id.* at 9.

Rule 60(a) is premised on the principle that the record should reflect what was intended by the district court. *Chavez v. Balesh*, 704 F.2d 774, 776 (5th Cir. 1983); *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976); *Pattiz v. Schwartz*, *supra*, 386 F.2d at 303. Here, the Ninth Circuit found it "clear . . . that the findings and conclusions were intended to be filed at the same time as the final judgment." Pet. App. 7a.

In *Pattiz v. Schwartz*, an amended complaint had been accepted by the district court but was never entered in the record. When the omission was discovered, the district court ordered that the record be corrected. The Eighth Circuit, in an opinion by then-Judge Blackmun, upheld the validity of that order:

> What the court here was effectuating, it seems to us, was nothing more than the correction in the formal record of a gap or error "arising from oversight or omission," within the definite and positive language of Rule 60(a)'s first sentence. The intent of the parties and, indeed, of the trial court itself, is clear . . . . [The district court's] action "would result simply in the record speaking the truth." . . . The district court by its order recognized only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending.

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[12] In circumstances such as these, the term "clerical mistake," as used in Rule 60(a), can apply to mistakes made by either the district court judge or the clerical staff. *Pattiz v. Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968).

386 F.2d at 303.

The cases relied upon by Tenneco, with one exception,[13] are not instances of clerical mistake and therefore do not fall within the Rule 60(a) exception to the general rule. Moreover, Tenneco fails to observe that in many of them, the district court's action was taken after the appeal had been docketed. For example, Tenneco relies on language from *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1326 (5th Cir. 1985), Petition at 11, but completely ignores two references in the same paragraph to the fact that the appeal there had been docketed. *See also Generes v. Bonnemer*, 74 U.S. (7 Wall.) 564 (1869); *Venen v. Sweet*, 758 F.2d 117 (3d Cir. 1985); *Ced's v. EPA*, *supra*, 745 F.2d 1092; *Gormong v. Local Union 613*, 714 F.2d 1109 (11th Cir. 1983).

The district court's entry of the Findings and Conclusions here was also unquestionably "in aid of the appeal." In its December 18, 1985 oral ruling on liability, the district court said:

> These comments that I'm going to make are not going to be definitive, nor are they going to be complete in all particulars. So I put that caveat in because on another occasion, I did make some comments when I ruled from the bench, and the briefs, then, came back saying that I hadn't discussed this, and I hadn't discussed that. Therefore, whatever arguments flowed from it. So I don't want anybody to get the impression that this short time that I'm going to take will address every question that's been raised.

Pet. App. 33a. Again in its August 28, 1986 Memorandum of Decision ruling on damages, the district court stated:

> The points addressed in this memorandum do not purport to be an exhaustive discussion of all the issues raised during the trial, but they will be discussed for the purpose of indicating the bases of the Court's decision .... [T]hese comments are not intended to be exhaustive of all issues raised by the parties hereto, but are designed to summarize some of the bases of the Court's decision.

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[13] In *Gormong v. Local Union No. 613*, 714 F.2d 1109 (11th Cir. 1983), there was an obvious clerical mistake, but the district court did not seek to correct it until after the appeal had been docketed; thus the case did not fall within Rule 60(a).

Pet. App. 41a, 45a. The Court then expressly directed Kern to prepare proposed findings and conclusions "on all material issues involved." Pet. App. 45a.

The very purpose of findings is "to aid appellate courts in reviewing the decision below." *Hurwitz v. Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943), *quoted by* the Advisory Committee on Civil Rules in connection with the 1946 amendment of Fed. R. Civ. P. 52. *See Hybritech, Incorporated v. Abbott Laboratories*, 849 F.2d 1446, 1450 (Fed. Cir. 1988) (reduction of oral ruling into written findings and conclusions "aids our review"); *Silverthorne v. Laird*, 460 F.2d 1175, 1178 (5th Cir. 1972) (written opinion "amplifying" and not contradicting earlier oral rulings held of "great aid" to appellate court, enabling it to "examine the case with a thorough understanding of the lower court's posture").

Moreover, here Tenneco took full opportunity to object at length to the proposed findings and conclusions, and the Findings and Conclusions as entered by the district court contained no substantive changes from the proposed findings and conclusions. On this basis, the Ninth Circuit distinguished this case from *Sumida v. Yunen*, *supra*, where the district court had filed *amended* findings and conclusions after appeal had been taken.[14] As the Ninth Circuit put it,

> The appellate court is entitled to review a fixed, rather than a mobile, record. Here the district court did not attempt to move the target; it merely set one in place.

Pet. App. 7a. Many of Tenneco's authorities do not apply here for the reason that the district court in those cases had "moved the target." *See, e.g., Generes v. Bonnemer*, 74 U.S. (7 Wall.) 564, 565 (1868); *Ced's v. EPA*, *supra* (rejecting supplemental opinion on ground that "the parties to an appeal are entitled to have a stable set of conclusions of law on which they can rely"); *Beliz*, *supra*; *cf. United States v. Aluminum Company of America*, 2 F.R.D. 224 (S.D.N.Y. 1941). In none of these cases did or would the losing party have an opportunity to object such as Tenneco did here.

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[14] Tenneco heavily relied on *Sumida v. Yunen* in the Ninth Circuit. It does not even cite that case here.

The facts in *Under Sea Industries, Inc. v. Dacor Corp.*, 833 F.2d 1551 (Fed. Cir. 1987), are in some respects similar to the facts here. (We could find *no* case presenting all the material factual elements of this case.) In *Under Sea*, as here, the district court made it clear that its oral ruling was not intended to constitute its formal findings, and directed the prevailing party to prepare proposed findings. The losing party objected to many of them. The court had the proposed findings before it for several weeks, and there was every indication that it gave them careful consideration. Although the findings were not entered until after appeal had been taken from the judgment, the Federal Circuit Court of Appeals, applying Seventh Circuit precedent, held that the general rule ousting the district court of jurisdiction upon the filing of a notice of appeal "is not inflexible or immutable . . . 'where a fair construction of the Federal Rules of Civil Procedure so requires.' " 833 F.2d at 1555. It stated that it knew of "no sound reason why the filing of the notice of appeal should have barred the district court from signing the findings and conclusions it intended to enter." *Id.*

Silverthorne v. Laird, supra, while dissimilar in some respects, is nonetheless instructive. There, two days before oral argument on the appeal, the district court entered a written opinion wholly consistent with the earlier order appealed from and thoroughly discussing the rationale for that order. The Fifth Circuit held that the opinion was of great aid to it in understanding the lower court's reasoning. However, because of the proximity of oral argument, the Court of Appeals gave the parties opportunity to file briefs discussing the written opinion. 460 F.2d at 1179. Tenneco, of course, has already had that opportunity.

Finally, we note that many of the cases on which Tenneco relies are simply not applicable here. Tenneco's Petition puts its primary reliance on *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), both of which deal with whether a notice of appeal is defective under Fed. R. App. P. 4(a)(4) where a Rule 59 motion has been timely made. The broad statements of *Griggs* and *Marrese* are not applicable here. Tenneco's reliance on the "bright line rule" of *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988), Petition at 10, is

especially inappropriate. The issue in *Budinich* was "whether a decision on the merits is a 'final decision' as a matter of federal law under [28 U.S.C.] § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined." 108 S. Ct. at 1720, 1722. *Budinich* and its bright line rule do not control in the very different circumstances here.

C. Reversal of the Decision Below Would Lead Only to Wasteful Re-Review of the Same Issues by the District Court, the Ninth Circuit and This Court.

Tenneco repeats here its plaint that it was deprived of the opportunity to move to amend supposedly erroneous findings and conclusions.[15] But given the fact that no substantive change was made in the Findings and Conclusions subsequent to Tenneco's blunderbuss objection, one wonders what Tenneco could have raised that it had not already argued to the district court. Obviously, Tenneco's after the fact statement, Petition at 15-16, that it was prepared to raise two new legal arguments it had not thought of before can be given no credence.[16] As the Ninth Circuit observed, "[t]o remand to the district court to enable Tenneco to file still another opposition, styled a motion to amend, to the same findings and conclusions would be pointless." Pet. App. 7a.

The Ninth Circuit aptly described the result advocated by Tenneco as "needless paper-shuffling." *Id.* There is no reason to believe that if the case were sent back to the district court, the Findings and Conclusions would be any different. Tenneco presumably would then re-appeal to the Ninth Circuit the same issues that court has already decided, would re-appeal the same issues to TECA, and would again pursue review in this Court.

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[15] Tenneco has apparently realized that nothing prevented it from moving for a new trial 10 days after judgment and has dropped that argument, which it had made to the Ninth Circuit.

[16] In any event, Tenneco was obligated to raise those arguments in its post-trial brief or, arguably, in its objections to the proposed findings and conclusions, at the latest. *See Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

II. Tenneco Question No. 2: Denial of Tenneco's Pretrial Motion for Disclosure.

A. Tenneco Argued Neither the First Amendment Nor Rule 26 to the Ninth Circuit Court of Appeals, and Did Not Even Raise the First Amendment to the District Court.

Almost one-half of Tenneco's Petition, pp. 16-28, is addressed to legal issues Tenneco did not preserve below. Tenneco argues here that the district court violated the First Amendment and Rule 26(c) of the Federal Rules of Civil Procedure in denying Tenneco's pretrial disclosure motion. However, Tenneco argued neither of these issues to the Ninth Circuit and raised only the Rule 26 issue to the district court, not raising the First Amendment issue in the district court until its post-trial motion, which was granted and therefore cannot be at issue here. In such circumstances, these questions are not properly before this Court.

"Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); see *Neeley v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967); Sup. Ct. Rule 17.1(a), (c). A petition presenting issues not preserved "in the last court prior to Supreme Court review" contains a jurisdictional defect. Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 Va. L. Rev. 197, 200 (1975).

As shown by Tenneco's Opening and Reply Briefs in the Ninth Circuit, Opp. App. 1a-12a, Tenneco *never argued* the First Amendment or Rule 26 to the Court of Appeals. It *presented* the issue as a First Amendment question, Opp. App. 2a, Question No. 6, *captioned* the disclosure portion of its argument in terms of First Amendment Rights, Opp. App. 4a, 9a, and *occasionally employed* the words "First Amendment," Opp. App. 3a, 7a, 9a, but it did not offer any First Amendment analysis or argument or cite a single one of the thirty-plus authorities it now relies on in Part II of its Petition. The Ninth Circuit panel consequently made no ruling on First Amendment or Rule 26 issues. As it noted,

> In addition, Tenneco captions one of its headings "The Court Violated Tenneco's First Amendment Rights By Preventing It From Petitioning The Department of Energy." Appellant's

Brief at 38. Tenneco never discusses this rather eye-opening contention.

Pet. App. 16a n.10. As to Rule 26 "good cause," Tenneco's Ninth Circuit briefs did not even mention the issue.

Nor did Tenneco raise the First Amendment to the district court on its pretrial motion for disclosure. While Tenneco told the Ninth Circuit in its Reply Brief that it *had* done so, Opp. App. 9a n.11, that reference was highly misleading. Each of the references in note 11 is to a paper filed by Tenneco on its successful *post-trial* motion to unseal the trial record. In its Petition here, Tenneco refers the court to filings regarding the "disclosure argument," Petition at 17 n.11; the last four references to the Excerpts of Record below again are to papers filed in connection with the successful *post-trial* motion.

Tenneco's Petition seems to be questioning the trial closure, but this is another issue Tenneco never raised in the Ninth Circuit; it made only a passing reference to the closure and presented no argument regarding its propriety. Indeed, the closure was not even an issue in the district court—as noted, Tenneco's counsel made no objection when Kern's counsel asked that proceedings be closed. Pet. App. 46a. A party may not sit idly by watching a supposed error being committed, and then raise it on appeal. *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184 (10th Cir. 1985); *see Tyrrell v. District of Columbia*, 243 U.S. 1 (1917) (writ dismissed when record disclosed complaining party had not objected in trial court); *Templeman v. Chris-Craft*, 770 F.2d 245, 248 (1st Circ.), *cert. denied*, 474 U.S. 1021 (1985) ("A party may not appeal from an error to which he contributed by failing to object.").

B. The Ninth Circuit Decision Cannot Possibly Conflict with the Decisions of This Court or Other Courts of Appeals, and the Particular Facts of This Case Do Not Lend Themselves to a Decision by This Court That Could Have Any General Application.

Tenneco argues that "the decision below" conflicts with this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and decisions of the Third, Sixth, Seventh and Eleventh Circuits on the relationship between civil discovery and the First Amendment. But the pertinent "decision below"—the Ninth

Circuit's decision—does not address these issues, because Tenneco did not raise them there. While there may well be conflict among the circuits, none is raised by this case and none would be resolved by taking it for review.

There are further reasons why this case is far from an "ideal vehicle," Petition at 27, to address the perceived Circuit conflict. The fact that disclosure here was sought by a party that wished to turn civil discovery documents over to a government agency is a circumstance that does not frequently occur and presents particular concerns that can affect the decision. *See GAF Corporation v. Eastman Kodak Company*, 415 F. Supp. 129 (S.D.N.Y. 1976). Similarly, instances of abuse of the discovery process and harassment of the opposing party such as occurred here present special considerations that do not regularly arise in the district courts and can control the decision. *Seattle Times*, 467 U.S. at 35-36; *see* n.19, *infra*.

C. The Case Presents No Public Interest or Public Policy Question.

Except for Tenneco's own judicially-determined fraud upon Kern and violation of the regulations in its dealings with Kern, this case presents no "fraud," no "coverup," and no violation of law. ERA, in its September 27, 1987 response to Kern's objections to the PRO, acknowledged that its complaint against Kern was "not predicated on any claim of 'fraud' . . . ." The ERA complaint is based on an *ex post facto* theory of liability that assigns wrong to transactions that were wholly in compliance with the regulations in effect at the time. As noted, its basic theory of liability has only once been tested beyond the agency level, and was there rejected. *Canal Refining, supra*.

Tenneco's dogged pursuance of an issue in which it has no interest is and always has been pure retaliation and harassment in violation of ethical and procedural rules as well as DOE regulations. Tenneco abused the discovery process and is acting for its own reasons, not out of any public spirit or public "duty." Tenneco argues that "[e]very day of delay in disclosing the information allowed the concealment of the fraud from DOE to be perpetrated." Petition at 28. If Tenneco was acting purely for altruistic reasons, one must then ask why Tenneco waited until five and a half months

after the trial to move to unseal the trial record.[17] The district court, at the August 4, 1986 hearing on Tenneco's post-trial motion, articulated a "sense of skepticism about Tenneco's commitment to the fundamental principles of the First Amendment."

Tenneco argues "it must be" the law that no court can prevent a party from reporting facts to the government, Petition at 29, and attempts to distinguish, *id.* n. 25, the line of cases holding that in circumstances such as those presented here, disclosure should not be allowed. In *GAF v. Kodak, supra*, Judge Frankel rejected just such a "public policy" argument:

> It may be that the sometimes romantic notion of the "private attorney general" should entail collaborative activity alongside the public attorney general. If that is to become an agreed conception, however, it should happen as a judgment of legislative policy, not as a judicial inference from rules fashioned for purposes of discovery in private litigation.

415 F. Supp. at 133; *see Data Digests, Inc. v. Standard & Poor's Corp.*, 57 F.R.D. 42, 44 (S.D.N.Y. 1972).[18] Tenneco's counsel conceded, at the August 4, 1986 hearing on the post-trial motion, that "the language of Judge Frankel . . . is very meaningful in the discovery phase," and that "*GAF* had to do with precisely what was going on in this courtroom and properly referred to until the trial happened." The district court here "fully agree[d]" with the *GAF* line of cases, Pet. App. 26a, and Tenneco never disputed that conclusion in its appeal to the Ninth Circuit.

In this case, contrary to the allegations in Tenneco's Petition at 29, the DOE could have obtained the documents Tenneco disclosed directly from Kern through its lawful investigatory powers under 15 U.S.C. § 754(a)(1), 15 U.S.C. § 772(e), and 42

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[17] Kern suspects that Tenneco's sudden sense of public "duty" was prompted by the Ninth Circuit's decision the previous month affirming Kern's damage award and the dismissal of Tenneco's counterclaims in the related overcharge case. *Kern Oil & Refining Co. v. Tenneco Oil Company*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987). *See also* n.4, *supra*.

[18] The district court decision in *GAF* remains good law, and is not contradicted by *United States v. GAF Corp.*, 596 F.2d 10 (2d Cir. 1979), where the intervening expansion of the Justice Department's investigatory powers under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 allowed it to obtain civil discovery documents. There is no comparable legislation authorizing the DOE to obtain private discovery documents.

U.S.C. § 7255. In this case, while no Fifth Amendment assumptions underlay the protective order, it specifically provided that discovery information would be used only for purposes of the litigation. Pet. App. 84a. In this case, Tenneco abused the discovery process.[19] Tenneco cites *Essex Wire Corporation v. Eastern Electric Sales Company, Inc.*, 48 F.R.D. 308 (E.D. Pa. 1969), for the proposition that "a litigant 'may make any lawful use' " of information obtained in discovery, but in *Essex* the court noted that the case before it presented "no reason to doubt the good faith" of the party seeking to disclose information to the government, *id.* at 312; here, there is ample reason to doubt Tenneco's posture as a good citizen.

The DOE and, if necessary, the courts, in the proper sequence of review, will decide whether Kern has violated the regulations and whether recompense is due to the government and injured parties, if any. Kern maintains that it did not commit any violation and is vigorously contesting the charges against it. But in any event, any public interest or public policy concerns will be protected in the DOE proceedings, and public policy does not require that this Court address the district court's decision denying Tenneco's pretrial disclosure motion.

Finally, we note Tenneco's admission that this case does not involve the public's right of access, Petition at 26, despite Tenneco's repeated references to the closure of the trial and repeated reliance on public access cases.

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[19] For this reason, the district court's decision was wholly consistent with *Seattle Times*, where this Court stated:

> Whether or not [Rule 26] itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent "equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices." [citation omitted] The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.

467 U.S. at 35-36, quoting *International Products Co. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (Friendly, J.).

D. Resolution of the Question Raised by Tenneco Would Have No Effect on the Outcome of This Case.

As explained above, the only way in which disclosure to the DOE could have affected the case before the district court would have been if the DOE had revoked the exception relief relied upon by Kern in its calculation of the damages caused by Tenneco. And when Tenneco went to the DOE with its story, explicitly asking the DOE to revoke Kern's exception relief, the DOE rejected that request. Ct. App. ER 4575.

Tenneco also argues that Kern's third party dealings show that it would not have refined the Yowlumne crude had Tenneco delivered it. The short answer to this contention of fact is that the district court allowed Tenneco to present the evidence of the third party transactions attempting to prove its point, and the court, as trier of fact, found against Tenneco. As the Ninth Circuit observed, there was "a great deal of evidence" before the district court on what Kern would have done with the crude. Pet. App. 17a. The district court found that "the credibility of a number of Tenneco witnesses was eroded," and especially noted the misleading nature of the testimony of one of Tenneco's experts on this issue. Pet. App. 41a-42a. The district court found Kern's evidence "more persuasive," *id.*, despite Tenneco's contentions that its evidence cast doubt on the credibility of Kern's witnesses. There is no reason to believe that the district court's factual findings on this question would be changed by the existence of the allegations in ERA's administrative complaint, the same allegations Tenneco made at trial.

Tenneco points to post-trial statements Kern made in response to the ERA complaint, alleging that Kern there took a position contrary to its position at trial. Tenneco has consistently misrepresented what Kern said, but its statement here is outrageous. Tenneco says, Petition at 8, "Kern was now arguing before DOE . . . that it would not have refined any additional price-controlled *Tenneco* oil." Kern said no such thing, and Tenneco knows it. Kern never mentioned the Tenneco oil. It said to the DOE that it would have sold, not refined, "primarily low-gravity," "severely disadvantaged" crude oil. The Tenneco Yowlumne crude was neither. The district court had before it evidence presented

by Tenneco showing that Kern sold some Yowlumne crude; it also had evidence showing that Kern would have refined most of the Yowlumne that Tenneco wrongfully withheld. The district court, as trier of fact, weighed the evidence and found in Kern's favor. There is thus no reason to expect that the district court would change its mind on the facts if presented with Kern's statement to the DOE.

Tenneco never had any legitimate reason for pursuing the issue of Kern's supposed "fraud." The district court, at the May 10, 1985 hearing on pretrial disclosure, noted its concern "about the proceedings in this case being used to stimulate proceedings before the DOE and FERC;" OHA, in its denial of Tenneco's petition for revocation of Kern's exception relief, noted the "attenuated relationship" between Tenneco's grievance and Kern's supposed regulatory violations. Tenneco had and has no interest in the questioned third-party transactions and it stands to gain nothing in the remedial proceedings now taking place. Once the DOE rejected Tenneco's petition for revocation of Kern's exception relief, Tenneco lost even the pretense that Kern's third party dealings could be of relevance in this lawsuit.

E. In Any Event, the District Court's Decision Was Correct and Fair.

As noted, the district court allowed Tenneco to present its evidence of the questioned third-party transactions and found that even if Kern had violated the regulations, the DOE would not revoke the exception relief relied upon by Kern. (And that, of course, was precisely the way it turned out.) As trier of fact, the district court found that Kern would have refined the Tenneco Yowlumne crude at issue, based on the court's evaluation of the witnesses' credibility and the "great deal of evidence" before it, including the evidence of the third-party transactions now before the DOE. The district court's rulings were manifestly correct and fair.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

EXCERPTS FROM TENNECO'S OPENING BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-6674
No. 87-5743

KERN OIL & REFINING CO.,
Plaintiff-Appellee,

v.

TENNECO OIL COMPANY,
Defendant-Appellant.

Appeal From The United States District Court for the Central District of California
The Honorable Laughlin E. Waters
Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

1. Are Kern's claims for breach of contract barred by res judicata, in view of the prior judgment based on the same contract in *Kern Oil & Refining Co. v. Tenneco Oil Company*, 792 F.2d 1380 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1349 (1987)?

2. Are Kern's claims barred by the four year statutes of limitations, as they were filed more than four years after the causes of action accrued?

3. Did Kern waive its claim for breach of contract by its course of performance and failure to give notice of breach until two years after the contract had terminated?

4. Did the district court commit error in excluding evidence that Tenneco would have terminated the contract had Kern given notice: (a) that Tenneco had breached the contract; or (b) that Kern asserted the right to purchase uncontrolled oil at the controlled price?

5. Did the district court commit error in awarding Kern damages for a period of 20 months based on a contract which was terminable on 90 days' notice?

6. Did the district court violate Tenneco's First Amendment rights by preventing Tenneco from petitioning the Department of Energy (DOE) to revoke orders based on Kern's fraud?

7. Does the $60 million Proposed Remedial Order issued by the DOE against Kern based on Kern's fraud demonstrate that the district court's findings are clearly erroneous and that Tenneco is entitled to a new trial?

8. Did the district court commit error in awarding *prejudgment* interest at the *postjudgment* rate?

9. Did the district court have jurisdiction to enter findings and conclusions after Tenneco had filed its Notice of Appeal and more than 10 days after entry of judgment, thus depriving Tenneco of its right to move to alter or amend the findings or for a new trial?

10. Did the district court commit error by awarding sanctions against Tenneco under Fed. R. Civ. P. 11 for filing post-trial motions, one of which the court granted?

STATEMENT OF THE CASE

. . . .

A. *Course Of Proceedings Below*

. . . .

In April 1985, some eight months before trial, Tenneco uncovered documents which demonstrated that Kern had systematically defrauded the DOE during the period for which it was seeking damages from Tenneco. (ER II:603, 607; VI:3486). Tenneco immediately moved the district court for an order permitting Tenneco to disclose the documents to the DOE in order to permit the DOE to institute an enforcement action against Kern which would result in the revocation of DOE orders on which Kern was relying in this litigation. (*Id.*). That action would have reduced Kern's damage claim by several million dollars. (ER VI:3736, 3743, 3745; *see* Section VI A, *infra*). Despite Tenneco's timely application, the district court denied the motion to disclose in October 1985, holding that although Kern had not carried its burden of demonstrating that the material was confidential, disclosure to the DOE at that time might delay the trial. (ER I:207).

When evidence of Kern's fraud was presented at trial, the district court sealed the courtroom, excluded the press and public, and sealed the record. (ER IV:1895-98). Following trial, Tenneco moved the district court for an order unsealing the trial transcripts and exhibits in order that Tenneco could exercise its First Amendment right to petition the DOE. (ER II:963). Not until Tenneco sought a writ of mandamus from this Court and Kern unsuccessfully sought a stay from this court and the Supreme Court, was Tenneco able to provide evidence of Kern's fraud to the DOE in October 1986—a year and a half after Tenneco's initial application to the district court. (ER I:210; VII:4176-78).

On March 31, 1987, the DOE issued a Proposed Remedial Order seeking a refund from Kern of approximately $60 million based on the illegal transactions engaged in by Kern during 15 months of the 20 month damage period. (ER VII:3759). As a result of the district court's infringement of Tenneco's First Amendment rights, Tenneco was forced at trial to defend against

an artificially inflated damage claim supported almost entirely by only two witnesses—each of whom *actively participated in and directed Kern's fraudulent scheme.* (*See* Section VI A, *infra*).

* * * *

VI. THE DAMAGE AWARD IS NOT SUPPORTED BY THE RECORD AND MUST BE REVERSED.

A. *The Court Violated Tenneco's First Amendment Rights By Preventing It From Petitioning The Department Of Energy.*

In early 1985, Tenneco discovered documents which demonstrated that Kern had systematically defrauded the Department of Energy by engaging in a series of illegal transactions which substantially reduced Kern's obligation under the DOE regulations to purchase "entitlements" on price-controlled crude oil it refined. (ER II:603, 607; VI:3486). *See* Mandatory Petroleum Allocation Regulations, 10 CFR § 211.1-211.71 (1979) (Add. 13-76). That evidence was highly relevant to Kern's damage claim.

Kern relied in this litigation on DOE orders obtained in 1981 which granted Kern retroactive relief from purchasing entitlements during part of the damage period (October 1979-March 1980). (ER V:2419, 2511). Kern also claimed that it would have refined more price controlled oil during the remainder of the damage period. (*Id.*). Kern's reliance on those orders and assumptions increased its damage claim against Tenneco by some $5 million. (ER VI:3584-85, 3595-600). Further, Kern's unlawful scheme demonstrates that had Kern purchased additional price controlled oil, it would have evaded its additional entitlement obligations rather than pay them and later seek relief. (*Id.*). In addition, Kern's illegal transactions were orchestrated, supervised, and carried out by Kern's principal witnesses on liability and damages. (ER IV:1932-35, 1957-73; VII:3774-78). Proof of the illegality of that scheme would have cast grave doubt on their credibility and thus on Kern's entire case.

Tenneco filed a motion in April 1985 (some eight months before trial) requesting leave to disclose to the DOE specific documents which demonstrated Kern's fraud on the DOE, in order

to give the DOE an opportunity to revoke the orders on which Kern relied in this litigation. (ER II:603, 607). Tenneco's disclosure motion was necessary because all discovery was under a protective order which "deemed" all information "confidential." (ER II:615).

Although Kern was given repeated opportunities to demonstrate that the documents were "confidential" it failed to make that showing, as the district court expressly found in an order issued six months later on October 11, 1985. (ER I:207). The court nevertheless denied Tenneco's motion on the ground that disclosure at that time might delay the trial. (*Id.*). Tenneco was thus improperly prevented from petitioning the DOE for revocation of orders on which Kern relied and, as a result, Tenneco was prejudiced.

The district court closed the entire damage phase of the trial at Kern's request, excluded the public and press, and placed the trial transcripts and exhibits under seal. (ER IV:1895-98). The district court excluded Tenneco's expert testimony offered in rebuttal which demonstrated Kern's fraud on the DOE. (ER IV:2003-30).

Following trial, but before entry of judgment, Tenneco moved the court for an Order unsealing the trial transcripts and exhibits. (ER II:963, 1002). Not until Tenneco filed a petition for a writ of mandamus in this Court and Kern had been refused stays by this Court and the Supreme Court did the district court finally unseal the trial record, thus permitting Tenneco to present the evidence to the DOE and petition that agency for relief. (ER I:210; VII:4176-78). On October 3, 1986, Tenneco disclosed the relevant materials to the DOE. The agency immediately opened an investigation of Kern and, on March 31, 1987, issued a Proposed Remedial Order (PRO) against Kern seeking some $60 million in unlawful profits and interest based on Kern's fraud on the DOE's entitlements program during the damage period. 52 Fed. Reg. 18,270 (May 14, 1987) (ER VII:3759).

The purpose and effect of Kern's fraud is succinctly stated in the PRO:

> As a result of this practice, Kern reduced its post-entitlements cost of crude oil below that which it would have incurred if it

had properly reported its controlled tier crude oil receipts to the Entitlements Program.

. . . .

[The] transactions, as viewed under the regulations, never really took place. The documents and facial complexity of the transactions were designed, in fact, "for the purpose of camouflaging the real deal" from the DOE.

. . . .

Kern's purported sales served as a vehicle by which *Kern unlawfully evaded its obligations under the Entitlements Program*. . . .

Id. at 3771, 3777 (emphasis supplied). The Court is requested to take judicial notice of the PRO pursuant to *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 522-23 (3d Cir. 1969), cert. denied, 396 U.S. 1009 (1970); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (a court may take judicial notice of records of administrative bodies).

The district court's refusal to allow Tenneco to present this evidence to the DOE before trial forced Tenneco to go to trial on a wholly artificial basis against an illegally inflated damage claim. As a result, the district court entered a wholly erroneous judgment based on clearly erroneous findings. (ER I:272-73 Nos. 29, 30, 289-90 Nos. 46, 47, 48, 49, 50). The judgment is based on the *assumption* that Kern's miscertification of oil was proper and not unlawful. (ER I:272 No. 29, 290 No. 50). However, the PRO demonstrates the falsity of the district court's assumptions, the errors in the findings (written by Kern), and the impropriety of the judgment.

Had Tenneco been allowed to disclose Kern's conduct to the DOE in a timely manner in April 1985, the district court would have had the benefit of the DOE's informed and authoritative views on Kern's conduct, and the trial of this matter might well have taken an entirely different course. The credibility of Kern's key witnesses on liability and damages (LeDoux and Eveland) would have been severely damaged, since—as confirmed by the PRO—they were the principal participants in Kern's illegal scheme. (ER

IV:1932-38; V:2428, 2567, 2602, 2621, 2663; VI:3001, 3109, 3469; VII:3774-76).

The denial of Tenneco's pre-trial disclosure motion prevented Tenneco from petitioning the DOE in a timely manner, thus violating its rights under the First Amendment. As a result, Tenneco was denied a fair trial on issues central to Kern's case on both liability and damages and the judgment should be reversed.

* * * *

CONCLUSION

. . . .

The trial court violated Tenneco's First Amendment rights by preventing Tenneco from petitioning the DOE to rescind orders upon which Kern relied in this litigation; the court then closed its eyes to willful and deliberate violations by Kern of DOE regulations, finding that there was "no evidence" that oil was miscertified. (ER I:290 No. 50). Having prevented Tenneco from proceeding directly before the DOE to challenge the orders, the district court held that Tenneco could not "collaterally attack" the DOE orders in court, either. (ER I:257-58). As the recently issued Proposed Remedial Order of the DOE demonstrates, the DOE believes that it was systematically defrauded by Kern and the district court's findings to the contrary are thus clearly erroneous. (ER VII:3770-79).

* * * *

APPENDIX B

EXCERPTS FROM TENNECO'S REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-6674
No. 87-5743

KERN OIL & REFINING CO.,

Plaintiff-Appellee,

v.

TENNECO OIL COMPANY,

Defendant-Appellant.

Appeal From The United States District Court for the Central District of California
The Honorable Laughlin E. Waters
Nos. CV 81-3253 LEW (Kx)
CV 82-6875 LEW (Kx)

APPELLANT'S REPLY BRIEF

INTRODUCTION

. . . .

Further, Kern's Statement of Objections filed in the DOE's Proposed Remedial Order ("PRO") proceeding against it requires that the judgment below be reversed. ER VIII:4613-4757. Kern represents in its Brief in this Court that it would have purchased and refined Tenneco's price controlled oil. Kern Br. at 43-45. Yet only one week before it filed its Brief, Kern admitted in its Statement of Objections that price controlled oil was too expensive, that it would *not* have purchased additional price controlled oil, and that it instead would have reduced its refinery runs rather than purchase and refine price controlled oil. ER VIII:4622-23, 4627, 4658, 4669-70, 4688-89.

Kern's position in the PRO proceeding is precisely that urged by Tenneco at trial, and makes clear that Tenneco was prejudiced by the district court's refusal to allow Tenneco to disclose Kern's fraud to the DOE before trial. *See* Tenneco Br. at 38-46. Had that disclosure occurred, Kern's key damages witness, Eveland, who masterminded the fraud on the DOE, never could have testified that Kern would have purchased and refined additional price controlled oil. Given Kern's admissions to the DOE, Kern's position in the district court and before this Court is untenable, and the judgment must be reversed.

ARGUMENT

* * * *

VI. TENNECO WAS PREJUDICED BY THE DISTRICT COURT'S DENIAL OF ITS FIRST AMENDMENT RIGHTS.

Kern's Statement of Objections to the DOE's Proposed Remedial Order demonstrates clearly the prejudice suffered by Tenneco as a result of the district court's erroneous denial of Tenneco's motion to disclose Kern's fraud to the DOE prior to trial.[11] Had

[11] The district court's violation of Tenneco's First Amendment rights was briefed below at ER II:963, 1002, 1077.

the district court granted that motion, Kern would have been unable to advance the arguments it did throughout the trial and its key witnesses could not have testified as they did. Kern's factual representations to the DOE directly contradict the factual representations it made to the district court—and those representations were adopted by that court. Kern's Statement of Objections demonstrates that the district court's findings are clearly erroneous.

A significant portion of Tenneco's oil that Kern claims it would have refined was price controlled oil. Tenneco presented evidence below that it was not in Kern's economic interest to purchase additional price controlled Yowlumne oil from Tenneco, since it was more expensive to Kern when DOE entitlement obligations were considered. Thus, Kern would not have refined that oil and its "lost profits" claim should be reduced by at least $5 million. *See* Tenneco Br. at 38-46; ER VI:3736, 3743, 3745; CR 358 at 27.

Kern's Brief in this Court states that:

> Kern's damage claim assumes that it would have refined most (not all) of the withheld Yowlumne crude and calculates the additional profits it could have made by doing so.

Kern Br. at 43.

> The district court found that "[h]ad the Yowlumne crude been made available to Kern, sound business practice dictates that it would have been processed by Kern and *not sold*. . . ."

Kern Br. at 45 (emphasis added). Finding No. 28, written by Kern—not the district court—states:

> Kern would have processed, *not sold*, 1,872,314 barrels of the non-delivered Yowlumne crude from April 1979 through November 1980. *It would have been sound business practice to do so*. . . .

ER I:271, No. 28 (emphasis added).

Contrast those factual representations with Kern's Statement of Objections to the DOE, filed on July 10, 1987:

> . . . Kern . . . had literally no alternative but *to sell* severely disadvantaged *price-controlled crude oil* if they wished to remain viable.

ER VIII:4627 (emphasis added).

> . . . Kern undertook these transactions in an effort to reduce its substantial crude oil costs. Had DOE announced while controls were still in effect the position it is now advancing for the first time, *Kern would most likely have sold the price-controlled crude in any event* because of its unacceptably high post-entitlements cost, and if unable to acquire exempt crude oil would have cut its refinery runs to reduce the adverse impact.

ER VIII:4669-70 (emphasis added).

> In these transactions, Kern was legitimately attempting to optimize its entitlements position under the regulations by *reducing its receipts of price controlled crude oil.* . . .

ER VIII:4688-89 (emphasis added).

Those factual representations by Kern are directly contrary to Kern's representations and testimony in the district court and in this Court that Kern would have purchased and refined additional price controlled oil. *See* CR 360 at 2-4, 11-14. Kern's statements to the DOE are admissions on which this Court may rely. *Fernhoff v. Tahoe Regional Planning Agency*, 803 F.2d 979, 985 (9th Cir. 1986); *United States v. Flores*, 628 F.2d 521, 527 (9th Cir. 1980). Those statements demonstrate that the district court's findings are clearly erroneous and that the damage award is overstated by at least $5 million.

Kern's recent admissions to the DOE also render irrelevant Kern's arguments regarding the DOE's 1981 "exception" orders. *See* Kern Br. at 39-42. Since Kern has admitted that it would not have refined additional price controlled oil, it never would have incurred additional entitlements costs from which it would later seek exception relief. Kern's damage claim thus is improperly

inflated regardless of whether the DOE ultimately decides to revoke its 1981 exception orders because of Kern's fraud.[12]

* * * *

CONCLUSION

. . . .

Kern's recent admissions in the DOE directly contradict the factual basis for the decision below and demonstrate that the findings are clearly erroneous.

* * * *

---

[12] Kern's Brief also misrepresents the DOE's action on Tenneco's Petition for Special Redress. Kern states, "Tenneco's contention that it was forced to go to trial 'on a wholly artificial basis against an illegally inflated damaged claim,'. . . is demolished by the DOE's denial of its petition." Kern Br. at 40. DOE did no such thing, and its letter disclaimed any such effect. Tenneco's petition was dismissed (not denied) "without prejudice to refiling at any time," and that was done because the DOE regarded the PRO proceeding as the more appropriate vehicle to address the matters raised by Tenneco's petition. ER 4575-76, 4579. The letter cited by Kern states, "I wish to make clear that there is a substantial basis for finding a violation, should Kern have actually engaged in the transactions alleged by Tenneco." ER 4576-77.

APPENDIX C

FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(a)

RULE 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Supreme Court, U.S.
FILED
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CLERK

No. 88-452

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TENNECO OIL COMPANY,
Petitioner,
v.
KERN OIL & REFINING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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---

REPLY BRIEF FOR PETITIONER [1]

Kern's Brief in Opposition amply confirms the need for review by this Court. On the jurisdictional issue, Kern seeks refuge in exceptions to the general rule of divestiture, exceptions that even the court below did not embrace and that clearly do not apply. On the disclosure issue, Kern does not deny that "there may well be conflict among the circuits," Opp. 22, arguing only that the issue was not adequately presented below—a contention clearly refuted by Kern's own appendices. Opp. App. 1a-12a.

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[1] The statement required by S. Ct. Rule 28.1 appears at Pet. ii & App. M.

The District Court Lacked Jurisdiction To Enter Its Findings And Conclusions After The Notice Of Appeal

1. There is no dispute that the District Court entered its findings and conclusions on November 24, 1986, three days *after* Tenneco filed its notice of appeal. Pet. App. 53a, 81a. Kern argues that this clear error should be disregarded because Tenneco had filed a lengthy opposition to the court's *proposed* findings, and the court had signed those findings (with only slight changes) on October 10. Opp. 2. The whole point, however, is that neither Tenneco nor Kern ever knew of the October 10 signing, or the fate of Tenneco's point-by-point opposition, *until the signed findings were entered on the record on November 24*. By then it was too late for Tenneco to file motions under Rules 52(b) and 59(a) to amend or make new findings, because judgment had been entered on November 5 and such motions must be made within ten days of judgment.

Kern contends that the District Court *must* have intended to file the findings with the judgment, that the failure to do so *must* have been a clerical error, and that the same findings *surely* would be reentered in any event if the case were sent back. Opp. 2, 13, 19. Judgments of more than $30 million cannot rest on such speculation, and the rules governing the allocation of jurisdiction between the district and appellate courts—which were not followed here—are designed to ensure that they do not.

2. Kern recognizes the general rule that a notice of appeal divests a District Court of jurisdiction, Opp. 14, but argues that an exception applies here, that the District Court could enter its findings after notice of appeal because it was simply correcting a "clerical error" under Rule 60(a). Kern did not file a Rule 60(a) motion in the District Court, the Court of Appeals did not rely on this exception, and it does not apply. A "clerical error" under Rule 60(a) is an error of transcription or copying,

such as typing "24" when "4" was intended. Nothing of the sort occurred here. The record properly reflects what actually happened: the findings were entered November 24, three days after notice of appeal. Pet. App. 81a.

Rule 60(a) can be used to conform the record to reflect what everyone knew to be the case at the time, but the key point here is that everyone did *not* know that the findings were signed on October 10 until November 24—as the record accurately reflects—and it is this lack of notice that directly affected Tenneco's rights. As one court has noted, "It is settled that [Rule 60(a)] applies only to an error of transcription, copying, or calculation, and not to a fundamental *failure of discovery or notification.*" *Bershad* v. *McDonough*, 469 F.2d 1333, 1336 (7th Cir. 1972) (emphasis added). Neither Tenneco nor anyone else was notified of the judge's action on October 10, and the record should not be retroactively "corrected" to suggest that they did.[2]

3. Kern refers to another exception to the jurisdictional rule, permitting acts "in aid of the appeal." Opp. 16. Again, the court below did not rely on any such exception, and it does not apply. Acts "in aid of the appeal" include efforts to maintain the status quo *pendente lite*, not to explain retroactively a decision after an appeal has been taken. The authorities on which Kern relies, Opp. 18, are telling. For example, *Silverthorne* v. *Laird*, 460 F.2d 1175 (5th Cir. 1972), is the case Judge Posner cited in *Matter of Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (concurring), to show the conflict on the

---

[2] *Pattiz* v. *Schwartz*, 386 F.2d 300 (8th Cir. 1968), on which Kern so heavily relies, Opp. 15, is readily distinguishable on this ground. That case involved a judge's failure to enter a pleading submitted in connection with settlement *by both parties themselves*, so they clearly had notice of it, and "[n]o prejudice could possibly result from what the court did." *Id.* at 303. Here the failure to file and enter the findings meant the parties did not and could not know that they had been signed, which clearly prejudiced Tenneco.

question presented. *See* Pet. 13. And the very court that issued *Under Sea Industries, Inc.* v. *Dacor Corp.*, 833 F.2d 1551 (Fed. Cir. 1987), has since recognized the inevitable problems with its approach—the approach followed here. *See Hybritech Inc.* v. *Abbott Laboratories*, 849 F.2d 1446, 1450-51 (Fed. Cir. 1988); Pet. 13 n.9. These and the conflicting cases cited in the Petition amply refute Kern's assertion that the jurisdictional issue does not arise with any frequency.

4. Kern's point, in essence, is that the District Court's post-appeal entry of findings was harmless error. As noted in the Petition, this Court recently held that such an analysis "misunderstands the nature of a jurisdictional requirement." *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 n.3 (1988). *Torres* involved a clerical error in a notice of appeal, and yet the Court insisted on strict adherence to the jurisdictional rules. It should do the same here, where much more than a "clerical" error is at stake, and where the court's error directly affected Tenneco's substantial rights.

Kern Does Not Dispute The Circuit Conflict On The Disclosure Issue, And Tenneco Properly Raised That Issue Before The District Court And The Court Of Appeals

1. Despite Kern's effort to avoid the merits of the undenied and undeniable conflict among the Circuits on the disclosure issue, the record is clear that Tenneco properly raised and preserved the issue before both the trial and appellate courts. The extensive litigation and briefing of the issue prior to trial, *see* Ct. App. Excerpts of Record 603, 607, 647, 679, 715, 746, 766, 821, 911, 955, was addressed to the existence of "good cause" under Rule 26(c)—as this Court in *Seattle Times* instructed it should be. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 37 (1984) (where "a protective order is entered on a showing of good cause as required by Rule 26(c), * * * it does not offend the First Amendment").

It was the denial of disclosure in the absence of good cause[3] that gave rise to a First Amendment violation, and the First Amendment issue was argued as such before the District Court, *see* Ct. App. Excerpts of Record 963, 1002, 1024, 1077, and—as Kern's own appendices show—before the Court of Appeals.[4]

2. Kern also contends that resolution of the disclosure issue will not affect the outcome of this case—that "[t]here is no reason to believe that the district court's factual findings on this question would be changed by the existence of the allegations in ERA's administrative complaint, the same allegations Tenneco made at trial." Opp. 25. This speculation is patently unfounded. There is *every* reason to believe that the court, which based its decision on a conclusion that Kern was "in compliance" with the DOE entitlements program, Pet. App. 43a, would have had a different view if it knew that DOE itself thought Kern "unlawfully evaded its obligations under the Entitlements Program." Ct. App. Excerpts of Record 3777. It was the court's order on disclosure that prevented Tenneco from obtaining and providing the agency's view to the court, and thus directly affected the outcome of the case.

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[3] There can be no serious dispute that this is what occurred; the District Court denied disclosure despite expressly finding that Kern had failed to establish good cause under the Rule. Pet. App. 29a, 48a.

[4] Kern's appendices show that Tenneco cited the First Amendment no fewer than *eight times* before the Ninth Circuit. *See* Opp. App. 2a, 3a (twice), 4a, 7a (twice), 9a, 9a n.11 (cross-reference to extensive briefing before District Court). Kern seems to take issue with the *extent* of Tenneco's briefing, not whether the issue was properly raised and preserved for purposes of Supreme Court review. Kern also criticizes Tenneco for not specifically objecting to the trial judge's closing the courtroom, but as the judge himself ruled, the closure was simply the continuation of the pre-trial order barring disclosure, *see* Pet. 5, to which Tenneco had vociferously objected. *See* Ct. App. Excerpts of Record 603, 607, 679, 746, 821, 955.

3. Kern also seeks to downplay the significance of DOE's Proposed Remedial Order ("PRO"), and Kern's own inconsistent positions. Kern argues that DOE did not accuse it of fraud, Opp. 3, but Kern's reference is to the exception relief issue—not the question of its evasion (DOE's word—not ours) of its obligations under the entitlements program. On that issue, the PRO speaks for itself: Kern reported transactions that "never really took place" and which "were designed, in fact, 'for the purpose of camouflaging the real deal' from the DOE." Ct. App. Excerpts of Record 3771.

Kern condemns Tenneco as "outrageous" for reporting that Kern is now arguing before DOE that it would not have refined additional price-controlled Tenneco oil, and that this was the opposite of what it told the District Court. Opp. 25.[5] Kern's own brief refutes its contention. Kern admits it is arguing before DOE that it would have sold and not refined certain price-controlled oil, *specifically including Yowlumne oil.* Opp. 12 & n.11. Before the District Court, Kern argued and the District Court held that "[h]ad the Yowlumne crude been made available to Kern, * * * it would have been processed by Kern and not sold." Pet. App. 17a. The Ninth Circuit itself recognized that "Kern is now arguing a different theory to a different tribunal * * *." *Id.*[6]

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[5] Kern's brief in opposition is replete with *ad hominem* attacks on petitioner as untruthful, deceptive, and outrageous, even going so far as to suggest that Tenneco is not "a good citizen." Opp. 24. Whether such a tactic will succeed remains to be seen, but at least the Court can rest assured that, if this case is argued, it "will have the benefit of adversary presentation." *Bender* v. *Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986).

[6] If the Court has any doubt about the seriousness of Kern's evasion of its obligations—and the direct effect of that evasion on Tenneco's rights in this litigation—it may wish to hold the Petition pending decision of the appeal before the Temporary Emergency Court of Appeals ("TECA"). As noted in the Petition, Pet. 7 n.3, the regulatory cause of action in this case was within the

4. On the merits of the disclosure issue, Kern does not dispute that there is a conflict. Opp. 22. It simply relies heavily on *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976)—a case which itself noted the conflict, *see id.* at 130-131, and which has been specifically rejected by other courts. *See* Pet. 26 & n.23. Kern also states that the present case presents "no public interest or public policy question," Opp. 22, a plainly untenable contention. The Circuits have split sharply on the disclosure question at issue here, and the courts themselves have explicitly acknowledged the split. *See* Pet. 26 n.23, 27 n.24. Here, a court order—expressly *not* based on "good cause" under Rule 26(c)—prevented a party from even revealing to the appropriate government authorities concrete evidence—later found to be true—that the other party had defrauded a government program to the tune of $60 million. Ct. App. Excerpts of Record 3771, 3777, 3780. This Court may or may not agree with such a result, but there can be little question that a conflict in the Circuits permitting it raises a public policy question of the utmost significance which this Court should resolve.

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exclusive jurisdiction of TECA, and has been appealed to that court. TECA No. 9-99. Briefing is complete, and Tenneco has moved for expedited disposition, alerting TECA that its decision on the issue of Kern's violation of the entitlements program could assist this Court in considering the questions presented in the Petition.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision of the court below.

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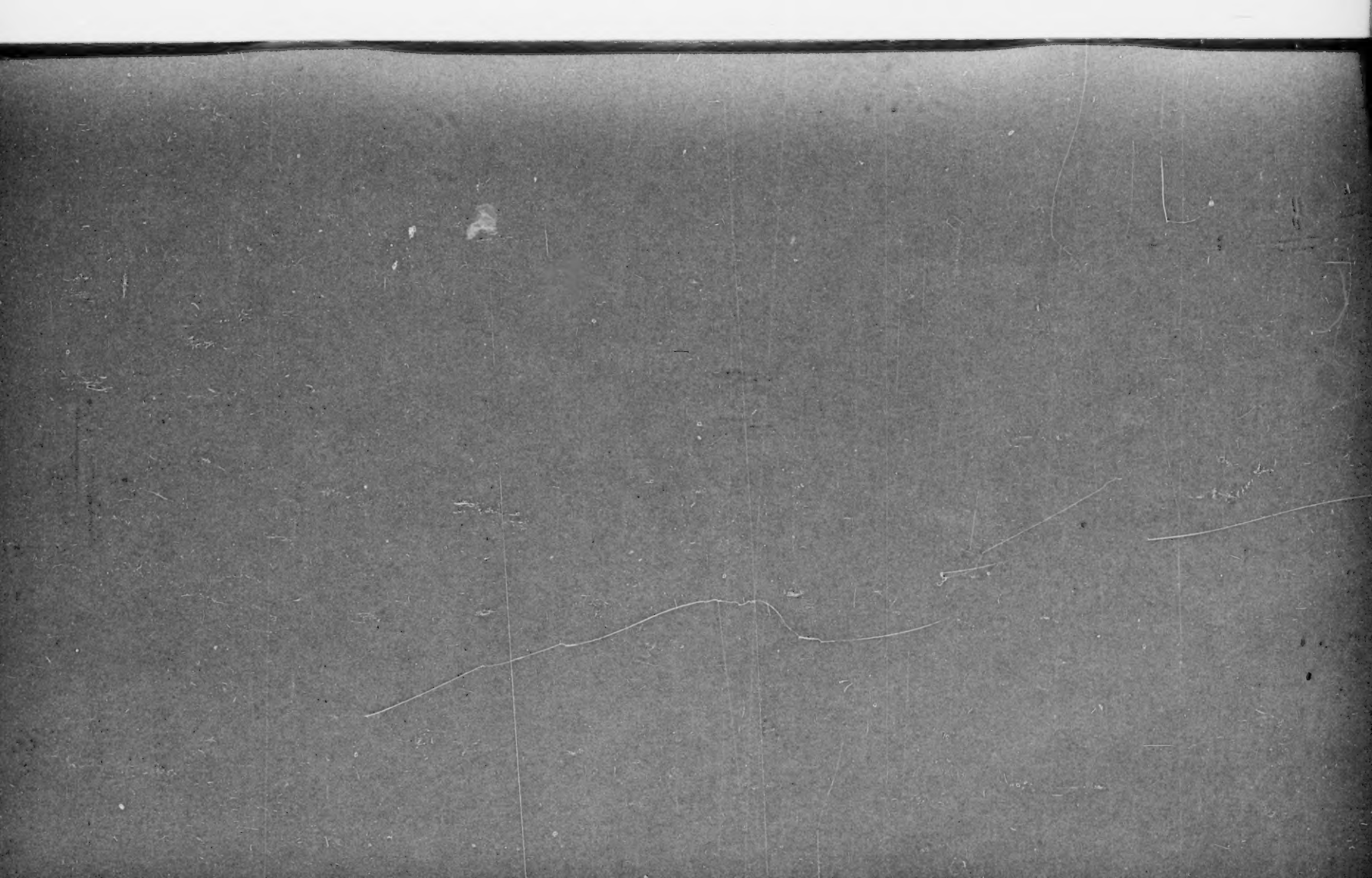

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---

SUPPLEMENTAL BRIEF [1]

Petitioner Tenneco Oil Company ("Tenneco") submits this brief pursuant to Supreme Court Rule 22.6 to call to the attention of the Court a recent Decision and Order issued by the Department of Energy ("DOE") in connection with that agency's proceeding against respondent Kern Oil & Refining Company ("Kern"). In an Order issued October 18, 1988—which came to Tenneco's attention on October 31, 1988—DOE ruled that three indi-

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[1] The statement required by S. Ct. Rule 28.1 appears at Pet. ii & App. M.

vidual principals of Kern should be joined as respondents in the agency's pending proceeding against Kern. *Decision and Order of the Department of Energy*, KRZ-0522, 0523, 0524 (Oct. 18, 1988).[2] In the course of its new decision, DOE rejected several key contentions on which Kern relies in opposing certiorari before this Court.

In its Petition and Reply Brief herein, Tenneco explained that the rulings of the courts below contravened Tenneco's rights and public policy by barring Tenneco from presenting to DOE evidence of Kern's fraud on that agency. *See* Pet. at 3-8, 16-30; Reply Br. at 4-7. Kern successfully resisted disclosure below by pointing to a DOE audit that found Kern in compliance with the pertinent regulatory program. As the District Court noted in ruling against disclosure, "the Department of Energy made an audit of entitlements compliance * * * and found Kern to be in compliance." Pet. App. 43a. Kern relies on the audit in opposing certiorari, highlighting before this Court the "satisfactory 1981 DOE entitlements audit of Kern in which the DOE had reviewed many (concededly, not all) of the documents Tenneco sought to disclose." Opp. Cert. at 5.

In its new Order, DOE emphasized that "[t]he violations that are here alleged are of a type that is very difficult to detect through a normal audit or by reviewing a firm's reports to the DOE." *Decision and Order*, at 7. The DOE Order confirmed that the facts that led to the agency action against Kern "did not become known to the DOE" until Tenneco was belatedly permitted to disclose the documents uncovered in this litigation, and that Kern "shares responsibility for [the] delay." *Id.* at 7-8 & n.5. As DOE noted:

> Tenneco attempted to bring the relevant facts to the DOE's attention in April 1985. However, Tenneco

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[2] A copy of the Decision and Order is included as an appendix hereto.

> had received this information pursuant to a protective order, and Kern contested Tenneco's attempt to lift the order so that the information could be disclosed to the DOE. [*Id.* at 8 n.5.]

Thus, DOE itself has now refuted Kern's reliance on the audit, and confirmed the significance of the disclosure Tenneco was barred from making for 18 months.

Kern argued below, and argues before this Court, that the Proposed Remedial Order ("PRO") issued against it—based on Tenneco's disclosures—"assigns wrong to transactions that were wholly in compliance with the regulations in effect at the time." Opp. Cert. at 22. The new DOE Order emphatically rejected this suggestion. The Order stated that "any reasonable person familiar with the general requirements of DOE regulations would recognize that tie-in arrangements such as those alleged in the Kern PRO were improper and would violate the regulations," and that Kern's alleged conduct "by its very nature approaches being inherently wrongful * * *." *Id.* at 9.

The District Court relied on a DOE audit of Kern in rejecting Tenneco's arguments at trial; if Tenneco had been able to disclose the documents to DOE that agency would have been able to explain, as it now has, that the violations at issue "are of a type that is very difficult to detect through a normal audit." *Id.* at 7. DOE has also now confirmed that the violations—though difficult for it to detect—were clearly improper and, indeed, "inherently wrongful." *Id.* at 9. Finally, the DOE decision to join the individuals in its proceeding against Kern—including the very individuals who were the key credibility witnesses for Kern below—highlights the prejudice to Tenneco of not permitting disclosure when Tenneco first requested it, eight months before the start of trial. Under such circumstances, the dangers of the rule below—which permits courts to prevent parties from

disclosing evidence of otherwise undetectable fraud to the appropriate governmental authorities—are clear.

The latest DOE Order confirms the need for this Court to grant the writ and reverse the decision below.

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APPENDIX

APPENDIX

[SEAL]

DEPARTMENT OF ENERGY
Washington, DC 20585

[Oct. 18, 1988]

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Interlocutory Order

Names of Petitioners:	Economic Regulatory Administration Kern Oil & Refining Company
Dates of Filing:	September 17, 1987 October 23, 1987 September 25, 1987
Case Numbers:	KRZ-0522 KRZ-0523 KRZ-0524

This proceeding arises from a Proposed Remedial Order (PRO) that the Economic Regulatory Administration (ERA) issued to Kern Oil & Refining Company (Kern) on March 31, 1987.[1] The PRO alleges that during the audit period from October 1979 through December 1980, Kern engaged in a scheme whereby it sold crude oil certified as lower or upper tier and purchased back the identical volume of crude oil certified as stripper well crude oil at a price below the market price of stripper well crude oil. The PRO alleges that this scheme violated the anti-circumvention provision of DOE regulations, 10 C.F.R. § 205.202, by allowing the firm to evade its entitlements obligations under 10 C.F.R. § 211.67. The PRO contemplates that the firm refund the benefits

[1] For purposes of this Decision, "Kern" also refers to Kern Oil and Refining's predecessors during the audit period.

it received from the scheme, plus interest. Kern filed a Statement of Objections to the PRO on July 10, 1987 (Case No. KRO-0520). On September 17, 1987, the ERA filed a Motion to Amend the PRO to correct erroneous statements concerning the organization structure of Kern, to add an additional theory of liability, and to join Russell B. Newton, Jr., Larry D. Delpit, and Donald M. LeDoux, to this proceeding. The ERA seeks to hold these three individuals jointly and severally liable for Kern's alleged violations. The present Decision considers this Motion as well as an ERA Motion to supplement the record and a Motion by Kern to strike the ERA's Response to its Statement of Objections.

I. *THE ERA's MOTIONS*

DOE procedural regulations state that the ERA may amend a PRO at its discretion prior to filing of a Statement of Objections. 10 C.F.R. § 205.192(e). The regulations are silent, however, with respect to amendments after a Statement of Objection is filed, although 10 C.F.R. § 205.199G gives this Office authority to issue any order necessary to enure that enforcement proceedings are conducted in an appropriate manner. We have held in prior cases that we will under these circumstances consider motions to amend a PRO. *See Hudson Oil Co.*, 11 DOE ¶ 84,001 at 87,002 (1983). In determining whether to allow an amendment, we are guided by several important considerations. First, we note that a PRO is not a final agency determination, but it merely charges that a firm may have violated the regulations. The final determination of whether a violation has occurred and whether a Remedial Order should be issued rests with this Office. The administrative review process before this Office is designed to permit the recipient of a PRO to present arguments and to allow the agency to revise its allegations and correct any errors in the legal and factual analysis of the PRO. *Elm City Filling Stations, Inc.*, 8 DOE

¶ 82,554 at 85,200 (1981). In exercising our responsibility, we may modify the findings of a PRO, or even change the theory on which liability is based, so long as the party to whom the Remedial Order is issued was given a full opportunity to contest such new theories of liability. *See Hudson Oil Co.*, 11 DOE ¶ 84,001 at 87,002 (1983); *Chevron, U.S.A.*, 5 DOE ¶ 83,007 (1980); *Champlin Petroleum Co.*, 4 DOE ¶ 80,101 (1979); *Time Oil Co.*, 3 DOE ¶ 82,512 (1979); 10 C.F.R. § 205.199B(a). *See also* Fed. R. Civ. P. 15(a) (permitting amendments to pleadings at any stage upon showing of good cause). Consequently, we are not precluded from granting a Motion to Amend, or even from making an amendment *sua sponte*, as long as there exists good cause for the amendment, and the amendment will not cause undue prejudice to any party to the proceeding. We also consider any administrative delay that may result from allowing the amendment. *ERA/Gulf Oil Corp.*, 12 DOE ¶ 82,532 at 85,143 (1984); *Getty Oil Co.*, 6 DOE ¶ 82,568 at 85,212 (1980).

A. *Organizational Status of Kern*

According to the ERA, during the audit period, Newton and Delpit owned a corporation with the name Kern County Refinery, Inc. On March 31, 1982, that corporation's stock was sold to a general partnership named Kern Oil & Refining Company, which dissolved Kern County Refinery, Inc. and assumed its assets and liabilities. Thereafter, the assets and liabilities of the partnership were transferred to a new corporation with the same name, Kern Oil & Refining Company. The PRO stated erroneously that Kern is now a partnership. The ERA asks that the PRO be amended to reflect that Kern is now a corporation in order to assure that any Remedial Order is issued to the proper entity.

This portion of the ERA's Motion is unopposed, and we find good cause for granting it. Accordingly, the PRO will be amended to reflect that Kern is a corporation.

B. *Violations Alleged*

The PRO in this case alleges that Kern sold lower and upper tier crude oil in transactions that were "tied" to its purchases of discounted stripper well crude oil. The PRO alleges that these tie-in arrangements violated the anti-circumvention rule which made it a violation to engage in any practice that circumvented or contravened the requirements of any regulation. The ERA seeks to add as an additional allegation that the same Kern transactions also violated the normal business practices rule, 10 C.F.R. § 210.62(c). This provision made it a violation to engage in any practice which constituted a means to obtain a price higher than was permitted by the regulations.

Kern opposes the ERA's attempt to add this additional allegation. The firm maintains that there is not good cause for the amendment because, according to the ERA, the two regulations are substantially the same and overlapping. Kern also contends that it would be subject to an undue burden if the amendment is granted because it has already gone to considerable expense to respond to the present PRO, and if the PRO is amended, it will have to file a new submission.

We find that the ERA's Motion to add the allegation that Kern violated the normal business practices rule to the PRO should be granted. This additional legal theory is not, as Kern asserts, redundant. While there is substantial overlap in the conduct prohibited by the two provisions, they are not identical, and some of the arguments that Kern makes in its Statement of Objections with respect to the anti-circumvention rule are inapplicable to the normal business practices rule.[2] Moreover, the normal

[2] For example, Kern's argument that the anti-circumvention rule is not a substantive regulation because it is included in the procedural regulations is clearly inapplicable to the normal business practices rule.

business practices rule is more specific. It lists some types of prohibited conduct (including inducements, discounts, and tie-in agreements), while the anti-circumvention rule does not. We find that there is good cause for adding the allegation, since the ERA may properly seek fuller consideration of alternative theories of liability arising from the same transactions that are the subject of the PRO.

We also find Kern's argument that it will be prejudiced by this amendment to be without merit. Kern will be allowed to file a supplemental Statement of Objections which addresses the amended allegations. The necessity of filing this additional Statement, while possibly imposing some burden on the firm, does not alone constitute undue prejudice. The additional allegation arises from the same transactions and involves basically the same alleged misconduct. The burden of responding to this added allegation should therefore be minimal. *ERA (Revere Petroleum Corp.)*, 12 DOE ¶ 82,544 at 85,234 (1985). Consequently, we find that the PRO should be amended to add the allegation that Kern violated the normal business practices rule.

In addition, we note that the PRO rests primarily on the position that Kern's conduct in this case allegedly circumvented the firm's entitlements obligations and asserts a refund liability based upon the amount by which the entitlements program was allegedly harmed. Nevertheless, in prior cases involving circumstances which are substantially similar to those alleged here, we have found that tie-in arrangements circumvented the price regulations applicable to the resale of lower and upper tier crude oil and constituted a means of obtaining an excessive price for such crude oil. *See Canal Ref. Co.*, 14 DOE ¶ 83,023 (1986); *Cities Service Oil & Gas Corp.*, 17 DOE ¶ 83,020 (1988). We will specifically consider whether the transactions at issue here circumvented the price regulations on the resale of crude oil as well as the PRO's

primary theory that they circumvented the entitlements regulations, and if the evidence in this case warrants, we may base a final Remedial Order on this theory.

In *Canal* and *Cities*, we found that the measure of liability for circumventing the crude oil reseller price rules was the amount of excessive payments received for the crude oil sales because of the tie-in arrangements, generally the amount of discount on the stripper well crude oil received by the firm. The record in this case contains insufficient evidence of the amount of the discounts to allow us to compute the overcharges if we should find violations and base liability on this theory. Accordingly, we shall direct the ERA to provide computations showing what the amount of Kern's overcharges would be if they were computed in accordance with the method used in those cases.

C. *Joinder of Individuals*

In its September 17, 1987 Motion, the ERA seeks to join Newton, Delpit and LeDoux to the PRO and hold them jointly and severally liable for any Kern overcharges. The ERA argues that it is reasonable to hold them liable for the alleged overcharges because they were the principal figures who participated in and caused the alleged violations, and because they benefited from the violations. The ERA does not seek to hold them liable on a traditional "piercing the corporate veil" theory, but on what has been called the "tortious conduct" theory of liability. This theory of liability is based upon the view that a corporate officer who was a central figure or animating force with respect to regulatory violations may be liable if he benefited from them. In prior cases, we have held that a corporate officer or owner may be held liable under the tortious conduct theory if (i) he exercised control over or participated in the transactions which were in violation of the regulations, and (ii) he personally benefited from the overcharges. *See, e.g., Beta Energy*

Corp., 14 DOE ¶ 83,025 at 86,208-09 (1986); *Doma Corp.*, 13 DOE ¶ 83,027 at 86,236-39 (1985); *AD Energy, Inc.*, 13 DOE ¶ 83,031 at 86,276-78 (1985); *Knox Oil*, 13 DOE ¶ 83,040 at 86,334-39 (1985). We have noted that to fail to impose liability upon corporate officials under these circumstances would allow persons who enriched themselves by violating the regulations to retain the fruits of the violations merely because they took advantage of a corporate shield intended to promote and protect legitimate undertakings.

We have also held on numerous prior occasions that we have authority under 10 C.F.R. § 205.199G to join additional parties to DOE enforcement proceedings. *See, e.g.*, *ERA*, 14 DOE ¶ 82,503 (1986); *ERA (RFB Petroleum, Inc.)*, 12 DOE ¶ 82,529 (1984). As with any motion to amend a PRO subsequent to the filing of a Statement of Objections, the ERA must demonstrate good cause for joinder and must show that joinder will not cause undue prejudice to any party or unduly delay the proceeding. As a rule, joinder is warranted where the case against the party sought to be joined arises from the same regulatory violations as are alleged in the PRO, and is especially appropriate where necessary to ensure that all parties essential to the just and efficient resolution of the case are present before this Office. Since the ERA may always issue a separate PRO to the parties it wishes to join, the standard we have used in evaluating motions to join is whether the ERA has presented enough evidence to make a *prima facie* case of liability sufficient to sustain a PRO under 10 C.F.R. § 205.192A(a). *ERA (RFB Petroleum, Inc.)*, 12 DOE at 85,129. In ruling upon motions to join we are not called on to decide the merits of the case against the parties, but only whether the ERA has presented a *prima facie* case.[3]

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[3] In their Responses to the ERA's Motion to join them, Newton, Delpit and LeDoux have submitted affidavits and other evidence to support their argument that they should not be held liable for

The Respondents have submitted a joint response opposing the ERA's joinder Motion which presents the arguments that they have in common. In addition, each individual Respondent has submitted his own response which deals with his own particular circumstances. We will address the Respondents' general arguments first.

The Respondents argue that the ERA's tortious conduct allegations against them are barred by the three year statute of limitations applicable to actions brought by the United States that are founded upon a tort. 28 U.S.C. § 2415. This is incorrect. Although the ERA's theory of liability is referred to as a "tortious conduct" theory, the liability is not founded on a tort, but upon a regulatory violation. As we have mentioned in prior cases, regulatory violations are not traditional common law torts. *ERA (RFB Petroleum, Inc.)* 12 DOE at 85,136 n.6. The term "tortious conduct" does not mean that the violations are torts, but refers to the fact that corporate owners and officers may be held personally liable for their own conduct in violating DOE regulations in a manner similar to the way that they may be held liable for their own torts. *ERA/Kenneth Walker*, 17 DOE ¶ 83,006 at 86,074 n.19 (1988). Consequently, the stat-

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Kern's alleged violation of DOE regulations. The ERA contends that it was inappropriate for them to submit evidence going to the merits of the case against them at this time, since the ERA will not have an opportunity to seek discovery or submit rebuttal evidence until after the parties are joined to this proceeding. The ERA is correct. In considering motions to join, the focus is on whether, as a matter of law, the ERA has presented a sufficient *prima facie* case. It is not appropriate to weigh the evidence regarding whether they should be held liable at this stage of the proceeding. Thus, while we shall consider the Respondents' arguments as to the legal sufficiency of the ERA's *prima facie* case in considering whether to join them, we will not consider their factual evidence going to the merits of the ERA's case. We shall consider that factual evidence at the appropriate time.

ute of limitations applicable to actions founded on tort is not applicable.[4]

In a related argument, the Respondents contend that this Office does not have jurisdiction to consider "tortious conduct" liability because they claim that only Article III courts have jurisdiction to consider actions based on common law. This argument lacks a factual basis because "tortious conduct" liability does not rest on a common law tort but on a violation of DOE regulations. It is well established that administrative tribunals have the power to adjudicate cases involving "public rights" as distinct from private rights at common law. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-70 (1982).

The Respondents further claim that joinder should be barred by laches. Laches is an equitable doctrine that may bar a proceeding where there has been unreasonable delay in commencing the proceedings and that delay results in substantial prejudice to the party. *Independent Bankers Ass'n v. Heiman*, 627 F.2d 486 (D.C. Cir. 1980). Laches does not generally lie against the government, and consequently, we have held in previous decisions that we will consider laches only when "the circumstances of the case are so compelling as to require us to disregard the general inapplicability of laches to the government in an effort to undo a grievous wrong." *A. Tarricone, Inc.*, 9 DOE ¶ 83,004 at 86,013 (1981); *Cities Service Oil & Gas Corp.*, 17 DOE ¶ 83,020 (1988).

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[4] Even if the personal liability of corporate officers were deemed to be founded on tort, we find that the general three year statute of limitations applicable to tort actions was superseded by the statute of limitations contained in the Petroleum Overcharge Distribution and Restitution Act of 1986, 15 U.S.C. § 4504, which pertains specifically to violations of DOE regulations. Moreover, 28 U.S.C. § 2416(c) provides that the tort statute of limitations does not run during periods in which the facts material to the right of action are not known and reasonably could not be known by the government. This is the case here. *See* note 5.

The Respondents contend that the long interval between the date of the audit period (beginning October 1979) and the filing of this Motion to Amend (September 1987) constitutes an unwarranted and prejudicial delay. We do not agree. The delay in commencing this proceeding was not unreasonable under the circumstances. The violations that are here alleged are of a type that is very difficult to detect through a normal audit or by reviewing a firm's reports to the DOE. The facts underlying the Kern PRO did not become known to the DOE until October 10, 1986, when Tenneco filed a Petition for Special Redress (Case No. KEG-0001) concerning the transactions.[5] The PRO was issued promptly after the ERA became aware of the alleged violations. Nor have the Respondents demonstrated that they have been substantially prejudiced by the alleged delay. They argue that with the passage of time memories of the circumstances surrounding the transactions have faded and documents may have been lost. Such general allegations, without any supporting evidence, are insufficient to establish prejudice. *Tugalo Gas Co.*, 12 DOE ¶ 83,027 at 86,352 (1985). LeDoux also maintains that he has been prejudiced by the delay because there has been a deterioration in Kern's financial condition. He asserts that if the ERA had brought this proceeding sooner, it might have been able to obtain full restitution from Kern and there would have been no reason to join him. This argument is speculative, and LeDoux has presented no supporting evidence. We therefore find the laches claim to be without merit.[6]

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[5] Tenneco attempted to bring the relevant facts to the DOE's attention in April 1985. However, Tenneco had received this information pursuant to a protective order, and Kern contested Tenneco's attempt to lift the order so that the information could be disclosed to the DOE. Thus, Kern shares responsibility for delay in this case.

[6] Delpit argues that he will be prejudiced by joinder because it would harm his credit standing. This argument lacks merit. Damage resulting from the possibility that a party might have to make

The Respondents also maintain that personal liability based on the tortious conduct theory may be imposed only for knowing or willful violations of DOE regulations. We do not agree. In *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16, 23-28 (Temp. Emer. Ct. App.), *cert. denied*, 108 S. Ct. 327 (1987), the Temporary Emergency Court of Appeals rejected the contention that personal liability was precluded by a finding that the individual acted in "good faith." The court found that personal liability for corporate violations may attach when the individual's wrongful conduct caused a violation of DOE regulations, even where the violation was not willful. However, the court noted that restitution is a legal remedy and indicated that a finding of personal liability should be based on the particular circumstances and equities of each case. *See also Phoenix Oil Co.*, 17 DOE ¶ 83,019 (1988). Moreover, we believe that any reasonable person familiar with the general requirements of DOE regulations would recognize that tie-in arrangements such as those alleged in the Kern PRO were improper and would violate the regulations. Consequently, the conduct alleged in this case by its very nature approaches being inherently wrongful and would satisfy the higher standards that the Respondents say apply.

The Respondents argue the ERA's Motion is defective because it does not contain a declaration by the DOE employee primarily knowledgeable about the facts of the case that the findings of fact are to the best of his knowledge correct. Such a declaration is required in PROs by 10 C.F.R. § 205.192(d). The Respondents argue that parties that are joined to an ongoing proceeding should have the same procedural rights as the parties to whom the PRO was issued originally, and they argue that this

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a refund of monies to which he was never entitled in the first place does not constitute a type of prejudice that would warrant denial of joinder where the ERA has made a *prima facie* case.

will not be the case if a declaration is not required in the present case.

We agree that joined parties should be afforded the same procedural rights as those to whom a PRO is issued. It does not follow, however, that a new declaration is required whenever the ERA seeks to join additional parties or otherwise amend a PRO. In fact, there is no regulatory requirement that the ERA provide such a declaration in a motion to join or amend, at least where the ERA does not seek to rely to any significant extent on new unsupported factual allegations. *See ERA/Gulf Oil Co.*, 12 DOE ¶ 82,532 at 85,144 (1984).

The Motion in the present case does not advance major new allegations of regulatory violations that might necessitate another declaration. The allegations in the Motion were supported by substantial documentary evidence. As set forth below, this documentary evidence, together with the factual allegations contained in the PRO, is sufficient to make a *prima facie* case of personal liability against the Respondents. The lack of a declaration does not deprive the Respondents of any rights that are available to parties to whom PROs are issued, since we are not relying on any unsupported factual allegations in making this determination.

The Respondents further argue that joinder should be denied in this case because of alleged misconduct on the part of counsel for the ERA. It is undisputed that ERA counsel telephoned LeDoux to obtain information concerning the roles played by Newton and Delpit in the transactions at issue, and that LeDoux declined to provide assistance to the ERA. The Respondents allege that ERA counsel improperly offered LeDoux immunity for testimony to the effect that Newton and Delpit were directly involved in the transactions. Counsel for the ERA has submitted an affidavit in which he states that he did not ask LeDoux for testimony that Newton and Delpit speci-

fically directed the transactions at issue, as alleged by the Respondents.

The Respondents have not shown that the telephone conversation between LeDoux and counsel for the ERA was improper. While there are some discrepancies between the two accounts, such accounts rarely coincide exactly, and the differences may result from a misunderstanding by LeDoux of the ERA's intent. Although ERA counsel may have indicated the testimony that he expected LeDoux to be able to provide, there is no evidence that he wanted that testimony if it was not true. In any event, even if there were something improper with this communication, it would not warrant denial of the joinder requested by the ERA since it is irrelevant to the merits of this case.[7]

Accordingly, the general objections to joinder that have been raised by the Respondents are without merit. We shall now consider whether there is good cause to join each individual in view of their respective roles.

1. Donald M. LeDoux

According to the record, during the audit period, LeDoux was Kern's vice president for crude oil supply. It is undisputed that he was responsible for negotiating and signing all crude oil purchase and sales contracts, including

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[7] LeDoux also maintains that the ERA's motive in seeking to join him to this proceeding is to punish him for not cooperating with the ERA. He argues that this motive is improper. There is no evidence to support this claim. It is clear that the ERA believed that it had a strong case for holding LeDoux personally liable for Kern's overcharges. That the ERA indicated that it might not seek to join LeDoux to the proceeding if he cooperated by providing the ERA with information concerning the participation of others in the alleged wrongful transactions does not imply an improper motive. It is often necessary for the government in prosecuting crimes and civil violations to negotiate with some participants in the wrongful conduct in order to proceed against other participants. This does not make such agreements improper.

the ones that are the subject of the PRO. LeDoux asserts that he relied on the advice of counsel concerning DOE regulatory requirements, and that he never knowingly entered into any contract that violated the regulations. LeDoux states that his total compensation for 1980 was $119,680.

The ERA has clearly made a *prima facie* case with respect to the first prong of the tortious conduct liability test, since it is undisputed that LeDoux personally participated in the transactions allegedly in violation of the regulations. LeDoux strongly asserts, however, that the ERA has not made a *prima facie* case with respect to the second prong, i.e., that he personally benefited from the violations. In this regard, he argues that he was not rewarded specifically for the questioned transactions and that his compensation was in no way tied to Kern's profit from them. He contends that his relatively low compensation during the audit period does not support a finding that he should be held personally liable for any overcharges that are established.

We find that the ERA has made a *prima facie* case that (i) LeDoux benefited from the transactions allegedly in violation of the regulations and (ii) that he should be held personally liable for the resulting overcharges. LeDoux states that his compensation for 1980 consisted of a base salary of $56,680 and a bonus of $63,000. He has submitted evidence that his salary and bonus were comparable to those of the other four Kern vice presidents, and he asserts that his total compensation was in line with that paid to persons with similar responsibilities in other independent refineries. LeDoux assumes that the ERA must show that his compensation was in some way directly tied to specific illegal transactions. This is incorrect. LeDoux admits that the amount of his bonus was based in part upon his job performance and Kern's performance in general. It is clear that Kern's profitability during the audit period would not have been as great had

it not been for the transactions at issue in this case. It is also likely that LeDoux's performance would not have been viewed as favorably if Kern had not made the profits it did from its crude oil transactions. Thus, at least a portion of the bonus LeDoux received appears to be attributable to the violations alleged in the PRO. The relatively small amount by which he benefited from the alleged violations is not relevant to determining whether he should be joined, but will be considered in determining the extent, if any, of his liability.[8] *See Phoenix Oil Co.*, 17 DOE ¶ 83,019 (1988). We therefore find that the ERA's Motion to join him to this proceeding should be granted.

2. Larry D. Delpit

According to the record, Delpit owned one-fourth of Kern and was its Chief Operating Officer. It was he who ran the firm from day-to-day and to whom LeDoux reported. The record indicates that during Kern's fiscal year 1980, Delpit received a salary of $———. In addition, Kern paid a dividend of $——— to its owners on April 22, 1981. The ERA states its belief that one-fourth of this dividend, $——— was received by Delpit, and Delpit has not denied it.

The ERA has clearly made a *prima facie* case that, as an owner of Kern, Delpit benefited from the profits that the firm made by allegedly violating the price regulations. His equity in the company, as well as his salary and

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[8] LeDoux states that his net worth is approximately $620,000 and argues that the ERA's Motion should be denied because he would be unable to pay any significant portion of any refund liability that is imposed on Kern. The extent to which LeDoux has assets able to satisfy any refund obligation that might be imposed is not relevant to determining whether he should be held liable. If his liability is established, the ERA would be entitled to recover from him whatever it could, even though it might be only a small fraction of Kern's total refund liability.

dividend income, would likely have been significantly less had the alleged violations not occurred.

The more difficult issue is whether Delpit either participated in, or authorized, the transactions at issue. The ERA argues that he had substantial control over Kern's crude oil transactions. Delpit states in a transcript submitted by the ERA that "[LeDoux] kept me informed of the majority of the things that were of consequence; small items, he did not." ERA Motion, Exhibit F at 2-124 (Transcript of *Kern v. Tenneco* proceeding). Delpit contends, however, that he did not participate in the transactions at issue. He states that LeDoux was delegated complete authority over Kern's crude oil transactions and that LeDoux did not require or seek his approval before entering into individual contracts.

As an initial matter, we wish to point out that personal liability is not limited to instances where the individual participated in the specific transactions at issue; it may also be imposed where the individual authorized, approved, or ratified the policies underlying the transactions. In any event, as indicated in note 3 above, we are not called upon at this juncture to weigh the evidence in this case. While we are not convinced of his responsibility, we find that the ERA has made a *prima facie* case that Delpit was responsible for Kern's operations, including its crude oil transactions, and that personal liability based upon the tortious conduct theory may be warranted. Accordingly, he shall be joined to the Kern proceeding.

In addition, we shall consider whether other theories warrant holding Delpit personally liable for any refund obligation that is ultimately imposed upon Kern. We have previously noted that general principles of restitution based upon a party's unjust enrichment may form a basis for personal liability for a corporation's violation of DOE regulations. *See, e.g., ERA (RFB Petroleum, Inc.)*, 12 DOE ¶ at 85,132. This theory is based on the view

that it would be unconscionable and contrary to the public interest to allow corporate owners to retain benefits attributable to a corporation's regulatory violations, since if the payments had not been made to the shareholders they would be available to the corporation to satisfy any refund obligation. Liability is especially warranted where the owner was in a position to supervise the corporation's operations and prevent the regulatory violations. Although the ERA has not argued this theory of liability, the record contains sufficient evidence to make a *prima facie* case that Delpit should be held liable on this ground. Because of its large profits from the alleged regulatory violations, Kern was able to pay Delpit a large salary and the April 1981 dividend. It is therefore clear that Delpit profited enormously from the alleged violations, since otherwise his payments from Kern would undoubtedly have been less. We shall also consider the applicability of the related "trust fund doctrine" which holds that a shareholder that receives corporate distributions holds them in trust for payment of bona fide corporate debts. *Bayport Ref. Co.*, 15 DOE ¶ 84,009 at 87,075 (1987); *Grant v. Ross*, 27 S.W. 263 (Ky. 1896); *Bartlett v. Drew*, 27 N.Y. 589 (1874).[9]

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[9] Liability based upon the unjust enrichment and trust fund theories is not joint and several, but is secondary to the corporation's liability. Thus, personal liability on these theories will be present only if Kern is unable to satisfy, in full, any refund obligation that may be imposed in this case. Moreover, the amount of liability is limited to the amount by which a party was unjustly enriched or the amount of corporate distributions received by the party. As a rule, this amount does not include salaries paid at the going market rate. However, especially with closely held corporations, the fact that a payment is denominated a salary rather than a dividend is not conclusive, and we may inquire whether the amount reasonably reflects the legitimate services provided to the corporation.

3. Russell B. Newton, Jr.

It is undisputed that Newton owned three-fourths of Kern and was its Chief Executive Officer. The record indicates that during fiscal year 1980, Newton also received a salary of $———. In addition, the ERA states that it believes that three-fourths of the April 1981 dividend, $———, was received by Newton, and Newton has not denied this.

In response to the ERA's Motion to join him to the Kern proceeding, Newton submitted evidence that he had little to do with Kern's operations. Based upon this evidence, the ERA states that it will be unable to demonstrate that Newton had participated in, encouraged, or condoned the transactions that allegedly violated the price regulations. It therefore has concluded that the tortious conduct basis of liability is inapplicable to Newton. Accordingly, on April 26, 1988, the ERA asked to withdraw the portion of its Motion that seeks to join Newton to the Kern proceeding.

We agree with the ERA that there is insufficient evidence in the record to find that the tortious conduct theory of liability applies to Newton. Nonetheless, for the same reasons noted above with respect to Delpit, the record makes a *prima facie* case of liability based upon the unjust enrichment and the trust fund theories. We believe that he should be joined to this proceeding on these bases. While we are reluctant to join a party that the ERA no longer seeks to join, there is no evidence that the ERA considered these other theories of liability when it sought to withdraw its Motion to join Newton, and we believe it should have the opportunity of considering them. In addition, since the liability, if any is established, of LeDoux and Delpit may be greater if Newton is not joined, we find that fairness to them also requires joinder. Finally, it will be administratively more efficient to consider Newton's potential liability at this time, rather than have to

consider it at a later date if the ERA should eventually decide to recover a portion of any overcharges from Newton.

D. *Motion to Supplement Record & Correct Typographical Errors*

On October 13, 1987, the ERA filed a Motion in which it asks that it be allowed to supplement the record. The ERA seeks to submit a copy of Kern's November 1979 Form ERA-49. This form contains evidence concerning the volume of crude oil that was involved in a transaction that is at issue in this case. The ERA states that it was unable to obtain a copy of the form earlier. The ERA also asks that it be permitted to correct certain typographical errors in its Response to Kern's Statement of Objections. Kern has not responded to these requests.

The Form ERA-49 contains evidence relevant to a disputed issue in this proceeding, and Kern will be permitted to respond to this new evidence. The typographical errors that the ERA seeks to correct in its Response are minor and add nothing new of substance to the ERA's submission. Kern will not be prejudiced by permitting the ERA to supplement the record and correct its Response. Under these circumstances, we find that the ERA's requests should be granted.

II. *KERN'S MOTION TO STRIKE*

In its Response to the Statement of Objections, the ERA assumed that we would grant its Motion to amend the PRO to add the allegation that Kern violated the normal business practices rule. Kern argues that this assumption in the ERA's Response improperly requires it to reply to issues that have not yet been made a part of this proceeding, and therefore, on September 25, 1987, Kern moved that the ERA's Response be stricken. Kern notes, however, that if the ERA's Motion to Amend is granted, then we may properly accept the ERA's Re-

sponse in the form in which it was filed. Since we are granting the ERA's Motion to Amend, and since Kern will be allowed a full opportunity to respond to the amended PRO, Kern's Motion to Strike is now moot. Accordingly, it shall be dismissed.

III. *CONCLUSION & FILING SCHEDULE*

As set forth above, we are granting the ERA's Motion to amend the PRO to add, as an additional ground of liability, the allegation that Kern violated the normal business practices rule, and we are joining LeDoux, Delpit and Newton to the Kern proceeding. In this regard, we are also requiring the ERA to submit computations showing the amount that Kern's alleged overcharges would be if they were computed in the manner used in *Canal* and *Cities*. We are also granting the ERA's Motion to supplement the record and to correct for typographical errors. Kern's Motion to Strike the ERA's Response is being dismissed.

Kern shall serve a copy of its Statement of Objections and the ERA shall service a copy of its Response on LeDoux, Delpit and Newton within five days. They shall file a certificate of such service with this Office. The ERA shall submit the alternative overcharge computations referred to above within 20 days of the date of this Decision. LeDoux, Delpit and Newton may file Statements of Objections and Motions for Discovery and Evidentiary Hearing, and Kern may file a supplement to its Statement of Objections addressing the new issues raised by the amendment to the PR0. These filings shall be made no later than 40 days from the date of this Decision, or 20 days from the date the ERA files the alternative overcharge computations, whichever is later. The Respondents need not repeat in detail in their Statements of Objections the arguments that have already been made by Kern in this proceeding; they may be incorporated by reference. The ERA shall have 30 days

from the date that the last of the foregoing submissions is filed in which to file a consolidated Response.

It Is Therefore Ordered That:

(1) The Motion filed on September 17, 1987, by the Economic Regulatory Administration (No. KRZ-0522) to amend the Proposed Remedial Order that was issued to Kern Oil & Refining Company on March 31, 1987, and to join additional parties to the Kern proceeding is granted as set forth in Paragraphs (4) and (5) below.

(2) The Motion filed on October 13, 1987, by the ERA (KRZ-0524) to supplement the record and to correct typographical errors in its Response to Kern's Statement of Objections is granted.

(3) The Motion filed on September 25, 1987, by Kern (No. KRZ-0523) to strike the ERA's Response to its Statement of Objections is dismissed.

(4) The PRO issued to Kern is hereby amended as set forth below:

(a) The PRO is modified to indicate that Kern Oil and Refining Company is a corporation.

(b) The PRO is modified to add the allegation that the transactions at issue also violated the normal business practices rule, 10 C.F.R. § 210.62(c).

(5) Donald M. LeDoux, Larry D. Delpit and Russell B. Newton are hereby joined as respondents to the Kern PRO. Kern shall serve a copy of its Statement of Objections, and the ERA shall serve a copy of its Response on LeDoux, Delpit and Newton within five days.

(6) The ERA shall file a schedule showing alternative overcharge computations assuming that overcharges are alleged based on the theory that the transactions at issue circumvented the price regulations applicable to the resale of crude oil.

(7) Additional filings in this proceeding shall be governed by the schedule set forth in the foregoing Decision.

(8) This is an Interlocutory Order and is subject to review only upon the issuance of a final Remedial Order.

/s/ George B. Breznay
GEORGE B. BREZNAY
Director
Office of Hearings and Appeals

Date: Oct. 18, 1988